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2594
No. 12312

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY G. HASKETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FILED

SEP 9 - 1949

JAMES M. CARTER,
United States Attorney,

PAUL P. O'BRIEN,
CLE

ERNEST A. TOLIN,
Chief Asst. U. S. Attorney,

NORMAN W. NEUKOM,
Asst. U. S. Attorney,
Chief of Criminal Division,

LEILA F. BULGRIN,
Asst. U. S. Attorney,

600 Federal Building, Los Angeles 12,

Attorneys for Appellee.

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No. 12312

IN THE
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HARRY G. HASKETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

(A) On May 11, 1949, appellant filed in the District Court of the United States for the Southern District of California, Central Division, a "Motion to Vacate Judgment." Said court had jurisdiction to hear this motion as it was filed pursuant to the provisions of Section 2255 of the new Title 28, U. S. C.

(B) This court has jurisdiction of the appeal from the decision of the District Court denying the "Motion to Vacate Judgment" under the provisions of said Section 2255 of the new Title 28, U. S. C.

Statement of the Case.

The appellant was prosecuted for a violation of the Mann Act (Title 18, U. S. C., Section 400) in the United States District Court for the Southern District of California, Central Division, and after a plea of not guilty to the charge was convicted by a jury and sentenced by the court on October 8, 1943, to 10 years in a Federal penitentiary. Thereafter, appellant filed an appeal from the judgment and commitment of the District Court and on November 15, 1944, the said judgment was affirmed by this court. See: *Haskett v. United States*, 145 F. 2d 465, C. C. A. 9th. On May 11, 1949, appellant filed *nunc pro tunc* as of May 2, 1948, in the above mentioned District Court, a motion to vacate judgment under Section 2255 of new Title 28, U. S. C. [T. 4-15], which was denied by the court on June 20, 1949 [T. 17]. Thereafter, on July 2, 1949, two documents each entitled "Notice of Appeal" were filed by the appellant [T. 21-26].

Statute.

"28 U. S. C., §2255 (New). Federal custody; remedies on motion attacking sentence. A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution, of laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which im-

posed the sentence to vacate, set aside or correct the sentence.

“A motion for such relief may be made at any time.

“Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

“A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

“The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

“An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

“An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.”

Statement of Facts.

The facts of the commission of the crime for which the defendant was convicted are of no importance in this appeal from the order of the District Court denying the appellant's motion to vacate judgment since the only purpose of a motion to vacate judgment is to determine whether or not the judgment of conviction is void on the face of the record. See cases hereinafter cited.

Questions Involved.

- (1) Whether or not diligence must be used in filing a motion to vacate judgment?
- (2) Whether or not a motion to vacate judgment may be used to review proceedings of trial as upon appeal?

ARGUMENT.

Diligence Must Be Used in Filing a Motion to Vacate Judgment.

Appellant has resorted to a motion to vacate judgment nearly six years after the date of his conviction in the District Court and almost five years from the date of the denial of his appeal from said conviction. It is submitted that the lapse of this period of six years from the date of his conviction, or even of the five years from the date his appeal was denied, is a sufficient bar to the vacation of appellant's judgment and conviction on his motion under Section 2255.

This is true although Section 2255 states in part: "A motion for such relief may be made at any time."

On page 1908 of the new Title 28 under "Revisor's Notes" there is the following notation:

"This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error *coram nobis*. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus. It has the approval of the Judicial Conference of the United States. Its principal provisions are incorporated in H. R. 4233, Seventy-ninth Congress."

In *United States v. Moore*, 166 F. 2d 102, C. C. A. 7th (Feb. 27, 1948), cert. denied 334 U. S. 849, the court stated at page 105:

"[5] Furthermore, we agree with the District Court that the petitioner has too long slept upon his rights. In the absence of an applicable statute expressly providing limitation, apparently there is no limitation of time within which a writ of error *coram*

nobis lies or within which a motion to vacate may be filed, except that *an applicant must show reasonable diligence in presenting his claim.* In *People v. Lumbley*, 8 Cal. 2d 752, 68 P. 2d 354, a delay of six years and eight months after conviction was held unreasonable; in *People v. Vernon*, 9 Cal. App. 2d 138, 49 P. 2d 326, a delay of four and a half years; in *U. S. v. Wright*, D. C., 56 F. Supp. 489, a delay of fourteen years. See also *U. S. v. Hunter*, 7 Cir., 162 F. 2d 644.

“[6] The reasons which support the rule requiring diligence seem obvious. The Government must assert its cause of action against the defendant within a limited time; and after judgment, especially upon a plea of guilty, it may naturally assume that the transaction is closed and rely upon finality of the judgment. Consequently, there is no reason for longer preserving evidence and maintaining contact with witnesses. Law enforcement officials change, witnesses die, memories grow dim. The prosecuting tribunal is put to a disadvantage if an unexpected retrial should be necessary after long passage of time. Of course, these considerations should not work to the disadvantage of one who acts promptly, but if, after knowledge of the facts relied upon, he willfully delays the assertion of his rights to the disadvantage of the Government, the result may often be not the granting a new trial to a defendant but the practical denial of any support for the Government to prosecute its action. *All limitations upon the assertion of rights and the granting of remedies are based upon sound public policy, reasons for which need no further elaboration but apply to and are the basis for the requirements of diligence. See cases above cited.*”

The court further remarked:

“We take it that there can be no question but that when it is sought to set aside and vacate a judgment, whether by complaint in equity or by way of *coram nobis* or its modern equivalent, a motion to vacate, such as we have before us, *no relief can be granted unless it appears that a retrial will result in a judgment different from the one sought to be vacated* and that, in the absence of such a showing, the judgment will not be set aside. The reason for this rule is that if defendant has no valid defense, so that a second trial must result in an identical judgment, then no actual injury has occurred and it would be a vain and idle thing to set aside the judgment already entered. As a corollary, it is not sufficient to aver merely, in general terms, that defendant has a good and meritorious defense but the nature of that defense, the facts constituting it, must be set forth in such detail as to enable the court to determine whether it is meritorious and sufficient.” (Italics supplied.)

In *U. S. v. Rockower*, 171 F. 2d 423, C. C. A. 2d (Dec. 27, 1948), a motion to vacate judgment was made on the ground the judgment was void because it was entered in disregard of the defendant's constitutional rights. It is not clear if this motion was made expressly under Section 2255. However, the court at page 425 mentioned Section 2255 and the Revisor's note on that section, but stated that it was not clear whether the remedy of a proceeding by motion in the nature of a writ of error *coram nobis* was available to Rockower since the conviction and sentence were long since executed. Even so, the court held it was not necessary to decide this question since the case of *U. S.*

v. Moore, supra, 166 F. 2d 102, pointed to the approximate decision. The court went on to say:

“The court, assuming the propriety of the remedy sought, denied it on three grounds: (1) that it must appear that a retrial would result in a different judgment from the one vacated and as a corollary there must be a showing of facts of valid defense or of a possibility of proving innocence or the like; (2) that the petitioner had too long slept upon his rights; and (3) that under *Gayes v. New York*, 332 U. S. 145, 67 S. Ct. 1711, 91 L. Ed. 1962, the defendant at the time of his subsequent sentence as a habitual offender had full opportunity to contest infirmities in the earlier sentences. All these grounds are directly pertinent here.”

Of interest to this court will be several California state court decisions dealing with the nature and origin of this motion to vacate judgment and the period of time in which it must be filed.

In *People v. Vernon*, 9 Cal. App. (2d) 138, 49 P. 2d 326 (Sept. 12, 1935), an appeal was taken to the District Court of Appeal, Second Appellate District, from an order of the Superior Court of Los Angeles County denying an application for a writ of error *coram nobis*. The court stated as follows:

“It is apparent that the remedy which the applicant sought in the lower court was inclusive of, but withal comparatively but a very small part of a remedial relief which, in the early stage of the development of common-law procedure, was obtainable by means of a ‘writ of error, *coram nobis*’;—the use of which was

recognized and permitted solely because of the absence at that time of the right to move for a new trial and the right of appeal from the judgment."

* * * * *

"—from all of which it is manifest that that which remains of the relief which ordinarily was available as part of the original common-law remedy of 'writ of error, *coram nobis*' is made equally available, not necessarily, as formerly, by the issuance of the *writ*, but simply by the legal machinery attendant upon a motion to vacate the judgment. It therefore results that, although the relief sought be of the nature of that included within and formerly afforded by a writ of error, *coram nobis*,—because of its comparatively ancient origin and its correspondingly relatively recent disuse, the mystery and the magic which now apparently attach to such an appellation as applied to the proposed remedy are completely dispelled and obliterated by designating such remedy by the more simple and appropriate name of a motion to vacate the judgment. The practical result of such practice in effect and substance demonstrates that the relief that may be administered by the one form of procedure is identical with that in the other."

* * * * *

"But, although the facts alleged to exist in the instant matter would appear to be such as should squarely invoke the application of the principle thus announced, it is suggested that in consideration of the existence of unquestioned additional facts, the relief for which the defendant has prayed should be withheld. In brief, such facts are, firstly, that at all times since his plea of 'guilty' was entered, with full personal knowledge on the part of defendant of the al-

leged facts and circumstances surrounding the making by him of such plea, without reasonable or any excuse offered or suggested in that behalf or connection, he has delayed and waited an unconscionable and unreasonable length of time, to wit, the space of more than four and one-half years without taking, or attempting in any manner to take, appropriate action in the premises, as far as such alleged facts were concerned;

* * * * *

“As a matter of legal principle, the rule has been frequently announced that, in order that it may be effective and within the possibility of favorable action thereon, a motion to vacate a judgment must be made ‘within a reasonable time’ after such judgment has been rendered; and in this state the concrete examples of what should be construed as ‘a reasonable time’ would seem to point to the conclusion that in the instant matter the delay has been so long that the prayer of the petitioner should not be granted. (18 Cal. Jur. 651, and authorities there cited.)”

In the recent case of *The People, Respondent, v. Louis Martinez, Appellant*, 88 A. C. A. 793, 88 Cal. App. 2d 767, 199 P. 2d 375 (Nov. 23, 1948), the defendant was sentenced to life imprisonment on June 18, 1940, and no appeal was taken. Nearly eight years later defendant moved to vacate the judgment of conviction. The motion was supported by affidavits but was denied by the trial court. This case cited is an appeal from the order of denial. The court stated:

“Although this proceeding was denominated below as a motion to vacate, it is properly a petition for a writ of error *coram nobis*.

* * * * *

"The writ of error *coram nobis* never issues to correct an error of law, nor to redress an irregularity occurring at the trial that could be corrected on motion for new trial or by appeal. It is issued to correct an error of fact, existing at the time of trial but unknown to the trial court through no fault of the petitioner, and which fact, had it been known, would have resulted in a different judgment, or would have prevented the rendition of the challenged judgment.

* * * * *

"Appellant offers no reasonable explanation as to why he delayed nearly eight years in making this application. An application for a writ of error *coram nobis* should be made within a reasonable time. *Diligence is required. A convicted person is not permitted to allow years to pass during which witnesses die, disappear or forget, and his own imagination grows and expands.* (Italics supplied.)

* * * * *

"In the instant case the unexplained eight-year delay would appear to be fatal to the request to grant the sought for relief.

"The writ of error *coram nobis* is not a catch-all by which those convicted may litigate and relitigate the propriety of their convictions *ad infinitum*. In the vast majority of cases a trial followed by a motion for a new trial and an appeal affords adequate protection to those accused of crime. The writ of error *coram nobis* serves a limited and useful purpose. It will be used to correct errors of fact which could not be corrected in any other manner. But it is well-settled law in this and in other states that where other and adequate remedies exist the writ is not available."

In *People, Appellant, v. John Lumbley, Respondent*, 8 Cal. 2d 752 (May 25, 1937), an appeal was taken from an order granting a writ of error *coram nobis*. In reversing the decision of the trial court, the court stated:

“‘It is our opinion that the courts have the power to issue writs in the nature of the writ *coram nobis*, but that the writ cannot be so comprehensive as at common law, for remedies are given by our statute which did not exist at common law—the motion for a new trial and the right of appeal—and these very materially abridge the office and functions of the old writ. These afford an accused ample opportunity to present for review questions of fact, arising upon or prior to the trial, as well as questions of law; while at common law the writ of error allowed him to present to the appellate court only questions of law. Under our system all matters of fact reviewable by appeal, or upon motion, must be presented by motion for a new trial, and cannot be made the grounds of an application for the writ *coram nobis*. *Within this rule must fall the defense of insanity as well as all other defenses existing at the time of the commission of the crime*. Within this rule, too, must fall all cases of accident and surprise, of verdicts against evidence, of newly discovered evidence, and all like matters.’”

The court further quoted *People v. Vernon, supra*, 9 Cal. App. 2d 138, and said at page 761:

“The untimely delay on the part of defendant in petitioning for the writ would have been sufficient grounds for denying it.” (Italics supplied.)

See also:

People v. Gilbert, 25 Cal. 2d 422 at 442 (Dec. 22, 1944);

Cuckovich v. United States, 170 F. 2d 89, C. C. A. 6th (Oct. 22, 1948).

As stated above, according to the Revisors Notes, Section 2255, "restates, clarifies and simplifies the procedure in the nature of the ancient writ of error *coram nobis*." Accordingly, no limitation was placed in said section on the time in which the motion must be filed, since before the enactment of Section 2255 there was no limitation of time within which to apply for a writ of error *coram nobis* (in the absence of an express statutory limitation). The one exception to this last statement as set forth in the cases was that the *applicant had to show reasonable diligence* in presenting his claim. The logical practical reasons behind this qualification of the rule are clearly set forth in *U. S. v. Moore*, *supra*, 166 F. 2d 102 at 105. Certiorari was denied in this case on June 14, 1948, a few months before the effective date of new Title 28; however, since Section 2255 is a restatement of the procedure in the nature of the writ of error *coram nobis*, the *Moore* decision is applicable also to proceedings under this code section.

In *U. S. v. Landicho*, 72 Fed. Supp. 425 (Aug. 11, 1947), the defendant entered a plea of guilty to a charge of murder in the second degree on or about November, 1941, and received a sentence of 20 years imprisonment. In November, 1946, more than 5 years after judgment was pronounced against him defendant filed a motion *coram nobis* to vacate judgment and for a new trial on the ground that at the time of the killing and during judg-

ment and sentence, the defendant was not of sound mind. At page 426, the court remarked:

“It is equally understandable that after lapse of many years, when witnesses against him may no longer be available and when at least one witness, apparently an important one, has been removed by death, the defendant should eagerly explore any and every avenue by which his freedom may now be attained.”

After stating that the “defendant’s motion, therefore, is in one aspect a motion for a new trial,” the court further said that:

“In some features the defendant’s allegations as stated in his motion may be based upon the assumption of the complete gullibility of those having power to act.”

In denying the defendant’s motion, the court concluded at page 429:

“Accordingly, I conclude that in formulating the Rules and particularly in rejecting the recommendation of the Advisory Committee for new trial on ground of denial of a constitutional right without limit as to time, the Supreme Court has provided in effect that the failure of the trial court—even failure from lack of factual knowledge—to accord to one accused of crime whatever is legitimately embraced in due process may be remedied through *habeas corpus* in all cases where relief by new trial or by appeal is not available. The enlargement of the common law scope of *habeas corpus* by Congress 28 U. S. C. A., §451 *et seq.*, and by definition as illustrated in *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A. L. R. 357, supports this view.

* * * Even before adoption of the Rules, a motion *coram nobis* sterile in result did not bar *habeas corpus*, *Waley v. Johnston supra*, 316 U. S. at page 105, 62 S. Ct. 966, 86 L. Ed. 1302, reinforcing the conclusion that by Rule 33, as adopted, the Supreme Court considered *habeas corpus* alone to afford a channel, indeed, *the* channel, for obtaining relief in all such circumstances as are here presented.”

Although this case was decided before the effective date of new Title 28, it is still persuasive authority in the case involved herein.

A Motion to Vacate Judgment May Not Be Used to Review Proceedings of Trial as Upon Appeal.

It is evident from the cases cited herein that a motion to vacate judgment can be used only for very limited purposes. The most recent federal decision on this point is *Birtch v. U. S.*, 173 F. 2d 316, C. C. A. 4th (March 9, 1949). The court stated at page 317:

“The present appeals are from orders denying motions made under 28 U. S. C. A. §2255; but we think that they are entirely without merit. It is true of motions made under this section, as we held of motions in the nature of applications for writs of error *coram nobis* under the prior practice in the appeal before us, that they ‘may not be used to review the proceedings of the trial as upon appeal or writ of error, but merely to test their validity when judged upon the face of the record or by constitutional standards.’ See also *Howell v. United States*, 4 Cir., 1949, 172 F. 2d 213.

“Relief under 28 U. S. C. A. §2255 may be granted only where it appears ‘that the judgment was rendered without jurisdiction, or that the sentence im-

posed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack.' *It should be borne in mind that the purpose of the section was not to enlarge the class of attacks which may be made upon a judgment of conviction, * * **" (Italics supplied.)

See also:

Birtch v. U. S., 164 F. 2d 880, C. C. A. 4th (Dec. 5, 1947), cert. den. 331 U. S. 825, 333 U. S. 848, 333 U. S. 870.

In the late case of *Howell v. U. S.*, *supra*, 172 F. 2d 213, C. C. A. 4th (Jan. 24, 1949), at page 215, the court gave further support to this proposition and said:

"It is elementary that neither *habeas corpus* nor motion in the nature of application for writ of error *coram nobis* can be availed of in lieu of writ of error or appeal, to correct errors committed in the course of a trial, even though such errors relate to constitutional rights. *It is only when there has been the denial of the substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of error coram nobis or under 28 U. S. C. A. 2255.*" (Italics supplied.)

In *Lucas v. U. S.*, 158 F. 2d 865, C. C. A. 4th (Dec. 6, 1946), at page 866, it was stated:

"It (motion to vacate judgment) raises no question, however, except whether the judgment and sentence are void on the face of the record, and cannot

be used to review the proceedings of the trial as upon appeal or writ of error. *Ong v. United States*, 4 Cir., 131 F. 2d 175."

See also:

Mancuso v. U. S., 162 F. 2d 772, C. C. A. 6th (June 30, 1947), at page 773;

Barber v. U. S., 142 F. 2d 805, C. C. A. 4th (Feb. 5, 1944), at 807-808;

Pifer v. U. S., 158 F. 2d 867, C. C. A. 4th (Dec. 6, 1946), writ den. Feb. 3, 1947, 67 S. C. 636;

U. S. v. Wright, 56 Fed. Supp. 489 (Sept. 6, 1944), cert. den. 330 U. S. 841, 331 U. S. 863;

Stidham v. U. S., 170 F. 2d 294, C. C. A. 8th (Nov. 2, 1948).

It is clear that appellant is here attempting to obtain another review of matters of fact already decided against him on appeal in this court. *Haskett v. U. S.*, *supra*, 145 F. 2d 465. Also, through his motion to vacate judgment, he was in effect asking the trial court to exercise the functions of the court of appeals by requesting it to review the proceedings of the trial as upon appeal. If such a practice were tolerated those convicted would be able to "litigate and relitigate the propriety of their convictions *ad infinitum*." *People v. Louis Martines*, *supra*, 88 A. C. A. 793, 88 Cal. App. 2d 767, 199 P. 2d 375.

It must be remembered that in the earlier stages of the development of the writ of error, *coram nobis*, the right to move for a new trial and the right of appeal from the judgment did not exist. Since the latter two remedies are now available, the writ of error, *coram nobis*, or its modern equivalent, the motion to vacate judgment, conse-

quently serves a modified and limited purpose. Further, the court in *Birtch v. U. S.*, *supra*, 173 F. 2d 316, observed that:

“It should be borne in mind that the purpose of the section (2255) was not to enlarge the class of attacks which may be made upon a judgment of conviction. * * *”

The question therefore is whether there has been the denial of the substance of a fair trial. *Howell v. U. S.*, *supra*, 172 F. 2d 213. Of course, it is the Government's position that this question need not be decided herein since the appellant did not use diligence in filing his motion under Section 2255 and therefore is barred from any relief thereunder. But, even so, assuming for the sake of argument only that the motion was timely made, it is clear that all of the “errors” designated by appellant are without merit and fall within the category of matters which cannot be reviewed by the trial court on a motion to vacate judgment. However, a few remarks will be made about several of these objections in passing.

Appellant questions the fact that the trial court erred in admitting testimony of his wife, Alma. This most certainly was a matter to be raised on appeal and not an error, if it were such, that would make the judgment void on the face of the record. See: *Goalette v. Hunter*, 73 Fed. Supp. 717 at pages 719, 720. Even so, the trial court did not err in admitting the testimony of appellant's wife. In *Hayes v. U. S.*, 168 F. (2d) 996, C. C. A. 10th (1948), the appeal was from an order denying a motion to vacate judgment and sentence. The appellant had been indicted on a charge of transporting his wife in interstate commerce with the intent of having her engage in

prostitution. A plea of guilty was entered to each of four counts and the appellant was sentenced to a term of imprisonment on October 22, 1946. The Court of Appeals affirmed the order of the District Court denying the appellant's motion to vacate judgment and stated at page 997:

"And, at common law, where the crime charged against the husband is a *personal wrong against the wife*, she is a competent witness against her husband. An act against the wife harmful to her morals is within the rule."

The rule that one spouse cannot be compelled to testify against the other is rigorously attacked by Wigmore, who states that the privilege has persisted on the "strength of certain artificial dogmas,—pronouncements wholly irreconcilable with each other, with the facts of life, and with the rule itself, and yet repeatedly invoked, with smug judicial positiveness, like magic formulas, to still the specter of forensic doubt." (VIII Wigmore, *op. cit.*, Sec. 2228, p. 224.)

Further, as this Court said, in *Cohen v. United States*, 214 Fed. 23, 29, C. C. A. 9 (1914):

"At common law the husband and wife were each under total disability to testify for the other, but the disability did not extend to the testimony of one against the other. Such testimony of the one against the other was excluded, however, unless both the husband and wife waived the privilege and consented to its admission. Wigmore on Evidence, §2242; *Benson v. Morgan*, 50 Mich. 77, 14 N. W. 705. But the common law made an exception to the rule of privilege in cases where the husband or wife was

called as a witness to testify as to personal wrong or injury sustained from the other. Wigmore, §2239.

“We are of the opinion that the personal injury to a wife which permits the admission of her testimony against her husband, within the exception recognized at the common law, and expressed in the Oregon statute, is not confined to cases of personal violence, but may include cases involving a tort against the wife, or a *serious moral wrong inflicted upon her, * * **” (Italics supplied.)

Here the victim was the wife’s own thirteen-year-old daughter and the defendant’s step-daughter. Surely, the conduct of the defendant toward this child was a “serious moral wrong” inflicted upon her natural mother as well as upon herself.

The cases of *People v. Lumbley*, *supra*, 8 Cal. 2d 752, and *United States v. Landicho*, *supra*, 72 F. 2d 425, demonstrate that the defense of insanity is not a matter to be presented on a motion to vacate judgment but again is a point that should have been raised on the appeal from the judgment and commitment. No affidavits or other supporting documents were filed with the appellant’s motion to establish this plea. Appellant was represented by competent counsel at the time of trial and apparently he saw no merit in raising the matter at that time or on appeal.

Appellant complains in his designation of “errors,” of the representation he received by counsel during the trial and at the hearing before the District Court on his motion to vacate judgment. However, the court in *Ong v. U. S.*, *supra*, 131 F. 2d 275 (Nov. 6, 1942), dealt with this point and stated on page 176:

“The brief filed by appellant makes complaint of the conduct of counsel who represented him on the

trial and of the charge of the court; but these are matters which cannot be considered on a motion to vacate a judgment on the ground that it is void. A defendant cannot wait until his time for appeal has expired and then review the proceedings of the trial on a motion to vacate the judgment as upon appeal or writ of error. Such a motion can prevail only where the judgment is void on the face of the record, *i. e.*, only where its invalidity appears upon the face of the court records themselves."

Appellant further complains of the sentence he received as a result of his conviction. The *Ong* case also disposes of this contention as follows:

"The appellant complains of the severity of the sentence imposed upon him and calls attention to a recommendation of clemency made by the jurors who tried him. This, however, is a matter for the Parole Board or the Pardon Attorney and not for us, as the sentences imposed are within the statutory limit."

It should be noted that in his brief on appeal, the appellant has included material which is not in the record before this court. See *Morris v. District of Columbia*, 124 F. 2d 284 (1941), which holds that extra-record evidence referred to in the briefs will not be considered on appeal.

Another point raised by appellant is that he was not "allowed a change of venue or his desired witnesses." However, there is no question that jurisdiction did exist in this case: and a change of venue is largely in the discretion of the trial court. See *Rakes v. U. S.*, 169 F. 2d 739, C. C. A. 4th (July 2, 1940), writ denied October 11, 1948. Further, in *Gates v. U. S.*, 122 F. 2d 571, C. C. A. 10th (Aug. 27, 1941), rehearing denied Oct. 10, 1941, the court held

that a change of venue for the convenience of a person charged with a crime and a change of venue for a trial at the place of residence of a majority of the witnesses is within the discretion of the court and the exercise of such discretion is not reviewable. Also see *U. S. v. Zeuli*, 137 F. 2d 845, C. C. A. 2d (Aug. 2, 1943), wherein the court quoted with approval *Hagner v. U. S.*, 54 F. 2d 446, and *Mahaffey v. Hudspeth*, 128 F. 2d 940, which held that an objection to the venue of a prosecution may be waived, and will be, by going to trial upon the merits.

Conclusion.

It is respectfully submitted:

(1) That the diligence required by the cases herein cited was not exercised by the appellant in filing his motion to vacate judgment in the District Court. Therefore, he is barred from relief under Section 2255 of the new Title 28.

(2) That a motion to vacate judgment may not be used to review proceedings of the trial as upon appeal and in this case appellant has cited no instance where he has been deprived of the substance of a fair trial.

(3) That even so, there is no merit to any of the "errors" designated by the appellant.

JAMES M. CARTER,
United States Attorney,

ERNEST A. TOLIN,
Chief Asst. U. S. Attorney,

NORMAN W. NEUKOM,
Asst. U. S. Attorney,
Chief of Criminal Division,

LEILA F. BULGRIN,
Asst. U. S. Attorney,
Attorneys for Appellee.

No. 12,313

IN THE

United States Court of Appeals
For the Ninth Circuit

GUNNAR A. LARSSON,

Libelant and Appellant,

vs.

COASTWISE (PACIFIC FAR EAST) LINE,

Respondent and Appellee.

BRIEF FOR APPELLEE.

JOHN H. BLACK,

EDWARD R. KAY,

HENRY W. SCHALDACH,

233 Sansome Street, San Francisco 4, California,

Proctors for Appellee.

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1954

U.S. COURT OF APPEALS



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No. 12,313

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GUNNAR A. LARSSON,

Libelant and Appellant,

VS.

COASTWISE (PACIFIC FAR EAST) LINE,

Respondent and Appellee.

BRIEF FOR APPELLEE.

PRELIMINARY STATEMENT FOR APPELLEE.

The above entitled cause was heard by the Honorable Dal Lemmon, Judge of the United States District Court, all witnesses having appeared in person and having testified orally, no evidence having been adduced by way of deposition. We respectfully suggest to this Honorable Court that this appeal, which involves only issues of fact, is merely an attempt to obtain a trial *de novo*. This cause was fully considered by Judge Dal Lemmon on two occasions. On February 28, 1949, the Court filed a memorandum decision and order in favor of the libelant for maintenance in the amount of \$21.00 and denied recovery for damages. Thereafter the Court made its *ex parte* order setting aside its memorandum decision and

order of February 28 and ordering the cause to be further briefed. Following re-submission the Court filed its order and opinion on May 24, 1949, affirming the previous award of \$21.00 for maintenance to the libelant and again denying him recovery for damages.¹ Both opinions indicate the matter was carefully considered and appropriate weight given to all the evidence (Ap. 20, 26). It is not believed that this Court should or will try this case *de novo*. The law appears to be well settled that the trial Court is in a better position to judge the credibility of witnesses and give weight to the evidence when all such evidence is adduced by witnesses personally present.

In the case of *Catalina-Arbutus*, 95 Fed. (2d) 283, Judge Denman of this Court stated:

“While this admiralty appeal is a trial *de novo* the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard all the witnesses, save one, and his deposition clearly sustains those heard. *Ernest H. Meyer* (C.C.A.), 1936 A.M.C. 1179, 84 Fed. (2d) 496, 501; *Silver Line, et al. v. United States, et al.* (9 C.C.A.), decided January 31, 1938, 1938 A.M.C. 521.”

To the same effect is the case of the *City of New York v. National Bulk Carriers, Inc.*, 138 Fed. (2d) 826, wherein it was said:

“It appears to be impossible to convince the bar that we will disturb findings of fact as seldom in admiralty causes, as in any other. Whether

¹Appellee does not contest appellant's right to the award for maintenance in the amount of \$21.00.

there lingers a notion—never in fact justified—that because an appeal in the admiralty is a new trial, the scope of our review is broader, we cannot know; but over and over again appeals are taken without the least chance of success except by oversetting findings of fact upon disputed evidence. In order to meet this persistence we may in the end find ourselves forced to invoke the penalty provided in Rule 28 (2) of this court.”

To the same effect are many other cases, including:

“*Heranger*”, 101 Fed. (2d) 953 (9 C.C.A.);
City of Cleveland v. McIver, 109 Fed. (2d) 69;
Commercial Molasses Corp. v. New York Tank B. Corp., 114 Fed. (2d) 248;
The S.C.L. No. 9, 114 Fed. (2d) 964.

Also in the case of *Tawada v. United States*, 162 F. (2d) 615, this Court enunciated the rule on this precise point as follows:

“(1) In an appeal in admiralty, where ‘a substantial part of the evidence was heard in open court’, the ‘correct rule’ is that the findings of the trial court ‘are accompanied with a rebuttable presumption of correctness’. *Thomas v. Pacific S.S. Lines, Ltd.*, 9 Cir., 84 F. 2d 506, 507, 508; *The Pennsylvanian*, 9 Cir., 149 F. 2d 478, 481. And, ‘where all of the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presumption (that the findings of the District Court are correct) has very great weight.’ ”

This Court succinctly stated the rule in *Stetson v. United States*, 1946 A.M.C. 900, 155 Fed. (2d) 359

(C.C.A. 9th), and in *Bornhurst v. United States*, 1948 A.M.C. 53 (C.C.A. 9th), as follows:

“The findings are supported by substantial evidence, are not clearly erroneous, and hence should not be disturbed.”

The facts in relation to every material issue in the matter at bar were decided by the District Court in favor of appellee and against appellant.

Should this Court determine, in its wisdom, to hear this matter *de novo*, we submit the following in reply to the appellant's brief.

INTRODUCTION.

Gunnar A. Larsson, a former seaman of the *Justo Arosemena*, seeks recovery of damages for personal injuries allegedly suffered by him as the result of the appellee's alleged negligence. A libel was filed under the Jones Act, 46 U.S.C. 688, claiming that appellee negligently and carelessly caused a winch, which appellant was oiling, to start up without warning; appellee was additionally charged with failure to provide appellant with a safe place in which to work. The *Justo Arosemena* was a vessel owned by the United States of America. The Government had originally been joined as a respondent by appellant but was dismissed at the trial by a minute order. The vessel was bareboat chartered by appellee Coastwise Line which entered into a per diem charter party with the Board of Supplies, Executive Yuan of the Republic of China

(Ex. 2). Under the terms of this charter appellee's sole obligation was to deliver the vessel alongside designated wharves at her several ports of call and the right and obligation to discharge her rested with the per diem charterer. The vessel's voyage commenced at San Francisco on February 28, 1947, and terminated November 2, 1947 (Tr. 50, 51). The vessel in the course of her nine months' voyage called at Yokohama, Tinian, Guam and Shanghai on four occasions, and thence return to San Francisco (Tr. 11, 12). At all ports of call Chinese stevedores loaded and discharged the vessel with the exception of Yokohama, where the work was done by Japanese nationals (Tr. 6, 7, 8, 25, 32, 102). It is the practice to use native stevedores in all countries of the world (Tr. 25). Appellant suffered an injury while oiling a winch which was being operated by a Chinese winchdriver in the employ of the Board of Supplies, Executive Yuan of the Republic of China, the vessel's per diem charterer.

FACTS AND EVIDENCE RELATING THERETO.

Appellant, Gunnar A. Larsson, was an experienced seaman (oiler) 32 years of age (Tr. 50). At the time of the accident he had had nineteen years of sea experience and held a Swedish engineer's license (Tr. 67) and had sailed on American ships for some three years (Tr. 67, 68). One of the duties of an oiler on American ships is to oil and grease winches (Tr. 72, 52). This work is done while the vessel's winches are being used in the course of loading or discharging

the vessel. The Justo Arosemena was equipped with five sets of steam winches, ten in all (Tr. 53). The winches were oiled in six places and there were grease cups on each winch in approximately twenty places (Tr. 54). During the nine months' voyage the total time occupied in loading and discharging operations involved approximately three months (Tr. 33, 34). During the course of such operations, which were conducted hourly, these winches, according to appellant's own testimony, had been oiled and greased not less than 10,000 times by the members of the crew concerned with their operation. By mathematical computation—there being six places to oil and twenty to grease on each winch—at least 260,000 individual operations were performed on the vessel's winches during the course of her voyage, and despite the complaints of appellant as to the stevedores' conduct not a single other accident was suffered in connection with the winches during the entire voyage (Tr. 32, 33). This fact alone weighs heavily against appellant's contentions. The appellant himself oiled or greased the winches at least 1,000 times (Tr. 70) which would require 26,000 separate operations. The appellant was supported in part in his claims by one Herrera, the engine room union delegate. Herrera's testimony related largely to what he had heard from others, and while his recollection was fairly clear in some respects that favored Larson's claim, he did not know the name of any of the vessel's officers nor did he know the names of the officers with whom he claimed he conversed, although he had been aboard the vessel for the entire voyage (Tr. 25,

26). He did not know the name of the officer in charge of the engine room or the officer in charge of the deck or where the Chief Engineer was at the time of an alleged episode that he described (Tr. 30, 31).

It took appellant between forty-five minutes and an hour to grease all the winches (Tr. 73); or to oil them alone, from ten to fifteen minutes (Tr. 74). On October 5, 1947, the day of his injury, Larsson serviced the winches during the stevedores' lunch hour, and the winch at which he was injured was the last to be worked upon by him on that round. When he came up to the winch the Chinese winchdriver was warming it up (Tr. 80). Appellant did not speak to the winchdriver but started to work on the winch after the winchdriver had given his "O.K." Appellant said nothing whatever to the winchdriver, merely showing him his grease gun before he commenced work. Appellant was working on the last grease cup when, according to his testimony, the winchdriver started up the winch, causing the grease gun to hit him on the wrist. Appellant did not know whether he had ever seen this particular winchdriver before (Tr. 81) and no one aboard the vessel could identify this particular winchdriver as being the one who had carelessly handled a winch before (Tr. 81). The appellant's witness Herrera admitted that he did not know whether the winchdriver that was operating the winch where Larsson was working was the one that had been operating the winches on the previous occasion three months before, nor did he recall seeing him aboard the vessel before or after the accident (Tr. 23).

Each of the vessel's ten winches is equipped with an individual shut-off valve which, if closed down prior to working on the winch, would completely immobilize the winch and make it entirely safe for anyone to work on or about it (Tr. 111, 112). Even appellant's witness Herrera admitted this fact (Tr. 39). After the valve is closed the winch cannot thereafter be operated until the steam valve is re-opened. The use of this valve is a proper way of immobilizing a winch and it is located within three feet of the winch's throttle (Tr. 112). It takes eight turns to completely close the valve which can be accomplished in less than a minute (Tr. 112). Upon the opening of the valve the winch can be put back into immediate operation (Tr. 113). It was within the discretion of the individual oilers as to whether they should completely immobilize any particular winch (Tr. 115). Once the valve had been closed the winchdrivers could not again start the winch (Tr. 112). All the witnesses admitted that there was no rule against using the valve to shut down the winch (Tr. 41). Appellant's witness, Houston, claimed that it was not customary for oilers to touch the valves. However, on re-direct examination, when asked by counsel for appellant if the valve were closed when working on the winch whether there would be anything to prevent the winchdriver himself from turning the steam valve back on again after the oiler had turned it off, this witness answered as follows: "No, there would be nothing at all to prevent it. *It happens in many cases.*" (Tr. 97). It was also claimed by this witness that these valves are only shut down when the

winchdrivers go to lunch or in the event an oiler has to make running repairs (Tr. 97). He likewise admitted that when the valves are shut down, such action is taken to prevent accidents (Tr. 100). The winches were in good order and condition and there was nothing the matter with them (Tr. 36).

ANSWER TO APPELLANT'S ARGUMENT.

I.

Appellant urges with unusual vigor that the *Justo Arosemena* was unseaworthy because of the alleged incompetence of the Chinese stevedores. There is not one iota of evidence even remotely tending to show that the stevedore operating the winch on the occasion of Larsson's injury had at any time during the entire three months of loading and unloading operations given any indication whatever that his handling of any of the vessel's winches was in any way improper.

Although, admittedly, while two previous experiences of difficulty were encountered with Chinese stevedores during the three months, there is not one word of evidence to connect the two prior episodes, which involved careless operation of the winches, with the winchdriver of the winch upon which appellant was working at the time of his claimed injury. There is nothing in the record which shows that the winchdriver with whom we are here concerned may not have been the best one in all of China. No acts of prior or later negligence were attributed to him even

by the appellant's most enthusiastic witnesses. How then, we inquire, could it be claimed that the ship-owner had notice or knowledge of the alleged incompetence of this stevedore, an employee of the vessel's per diem charterer? The principal complaint against the winchdriver manning the winch at which appellant was injured is that he was Chinese, and the argument seems to be that by reason of his nationality he was per se incompetent because two other Chinese nationals (it may have been the one man on both occasions) had on two prior occasions, the first of which was three months before Larsson's accident, shown some evidence of negligence. We venture to suggest that more than one stevedore in the port of San Francisco is negligent and careless on any particular day. Is it not inappropriate to inquire whether such circumstance per se makes all American stevedores in the port of San Francisco negligent?

As pointed out, not a single other injury was suffered during the entire course of the vessel's nine months' voyage, three months of which were consumed in stevedoring operations. Doubt exists as to whether such an enviable record has been achieved in our local ports.

In support of appellant's ill conceived theory of liability he has cited *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 Sup. Ct. 872 (1946). In view of the tendency of all seamen to claim the *Sieracki* decision in support of their positions irrespective of whatever they may be, we respectfully submit that

that decision does not of necessity guarantee a recovery to all seamen in any amount, based upon any possible claim, no matter how fantastic. The Jones Act has not as yet become an unqualified all risk policy of unlimited insurance running in favor of all seamen claimants under all possible conditions. In *Seas Shipping Co. v. Sieracki*, supra, Sieracki was employed by an independent stevedoring contractor which was under contract to the Seas Shipping Co. to unload one of its vessels. The libelant was operating a winch and when a load on the boom was being lowered the shackle supporting the boom broke at its crown causing the boom and tackle to fall and injure Sieracki. The Court there held that the shipowner's obligation of seaworthiness extended to longshoremen. As noted, that decision was based upon facts far different than here. In the *Sieracki* case the ship's gear, while being used in the manner intended, carried away. We have no such problem even remotely touching upon such facts here.

In support of the same point appellant refers to the recently decided case of *United States v. Arrow Stevedoring Company*, 175 Fed. (2d) 329 (Petition for Writ of Certiorari has been filed and is now pending before the United States Supreme Court). As in the *Sieracki* case, supra, the accident was caused by an unseaworthy vessel and the action was predicated upon the failure of unseaworthy ship's gear which, in the *Arrow* case, was negligently used by the stevedores. There was nothing unseaworthy or improper about the *Justo* Arosemen or her winches. They were all in good

running order and condition. In the *Arrow Stevedoring* case the vessel owner admittedly had knowledge of the vessel's unseaworthiness. In the case at bar there were no unseaworthy conditions nor did the shipowner know nor could he have had any opportunity to ascertain or know that the winchdriver might at some time in the course of his whole career start a winch prematurely.

Appellant wanders far from his original premise in citing, on page 18 of his brief, *The Rolph*, 299 Fed. 52. As is well known to this Court, the facts in *The Rolph* involved the employment by the shipowner of an officer who was known to be of vicious and wicked propensities and of a most brutal and inhuman nature, demonstrated by previous acts.

Peninsular & Occidental S. S. Co. v. N.L.R.B., 98 Fed. (2d) 411, is not even remotely in point. This case came about when the steamship company brought proceedings to vacate an order of a National Labor Relations Board regarding unfair labor practices. *Spellman v. American Barge Line Co.*, 76 Fed. Supp. 1, merely stands for the proposition that whether a vessel is properly manned by an incompetent master and crew is a question for the jury. In *State of Maryland*, 85 Fed. (2d) 944, the Court held that it was negligence to fail to instruct a young and inexperienced seaman in his duties.

It will be noted that, contrary to the situation in the matter at bar, the relationship of master and servant existed in all the foregoing cases cited by appellant.

II.

Appellant in his brief (page 19) again argues that the case of *Seas Shipping Co. v. Sieracki*, supra, is controlling. We believe that we have shown that the *Sieracki* case is in no wise in point and not here controlling. Appellant would have this Court believe that by entering into a *per diem* charter, appellee did so for the sole purpose of closing American courts to him. Nothing could be more ridiculous. *Per diem* charters were a very common form of commerce long before the Jones Act was heard of and there is nothing unusual or uncommon about them. They are not entered into for the purposes claimed by appellant nor do they represent attempts of the shipowner to avoid his responsibilities through subterfuge. Appellant cites the cases of *Mahnich v. Southern S. S. Co.*, 321 U.S. 96; *DeZon v. American President Lines*, 318 U.S. 660; *Meyers v. Pittsburg S. S. Co.*, 165 F. (2d) 642, as standing for the proposition that a seaman who was injured through the negligence of a *fellow servant* is entitled to indemnity from his employer. We believe the rule that a seaman can recover for the negligence of a fellow servant is so fundamental that it needs no comment. Such, however, is not the case in the matter at bar.

Appellant, by an ingenious argument, seems to claim that a seaman libellant has neither the burden of proof of showing negligence upon the part of the ship nor its unseaworthiness. Indeed, under this test all that is required to recover damages is an injury of some sort and, *ipso facto*, the seaman acquires wealth. Ap-

pellant seems to insist that a shipowner is liable in the absence of his fault or negligence. In the absence of unseaworthiness we submit that the answer is so self apparent that it requires no argument. Additionally, we feel that appellant's complaint that because his injury was suffered in China and not elsewhere, deprives him of a right that he otherwise might have had against the allegedly offending stevedores is utterly without merit. It is not our concept that public policy will authorize a cause of action by an injured seaman against a vessel simply because it would be inconvenient for him to sue the party responsible for his injury elsewhere than in his home port.

III.

In support of his third argument (at page 24 of his brief), appellant again relies on *Seas Shipping Co. v. Sieracki*, which case we have heretofore distinguished. Additionally, he relies on *Francis v. Seas Shipping Co.*, 158 Fed. (2d) 584. A seaman aboard the vessel was required to man one of the vessel's guns during an air raid alarm. He was unable to reach his gun because the passageway from his bunk to the gun position was littered with dunnage upon which he slipped and fell, injuring himself. The jury found that the dangerous condition which existed, and which the master could have reasonably obviated in the interest of safety of the crew, constituted an unsafe place to work. The next case cited by appellant is that of *Shields v. United States*, 73 F. Supp. 862. We agree

with the conclusion of the Court and believe the case to be on all fours with the one at bar. *This case will be fully discussed later.* In *Kunschman v. United States*, 54 Fed. (2d) 987, the rule is laid down that an owner who lets the construction of an engine to an independent contractor is not responsible under the doctrine of *respondeat superior* for the negligence of such contractor or his servants unless the owner supervises the work and knows or should know because of such supervision that the engine was inherently dangerous. Here is a case cited by appellant that stands for the proposition for which we contend. In the instant case the shipowner did not know, and had no way of knowing, that the winchdriver, a third party's employee, might or would prematurely start his winch. In the case of *American Pacific Whaling Co. v. Kristensen*, 93 Fed. (2d) 17, cited on page 30 of appellant's brief, the ship there involved was equipped with a defective whaling gun which exploded injuring a seaman. That case does nothing more than to reiterate the elementary rule regarding the principles of law involved in "dangerous instrumentality" cases.

IV.

Under topic IV of appellant's brief (page 30) he again cites *Francis v. Seas Shipping Co.* which we have heretofore discussed and additionally cites *Mulligan v. Eastern S. S. Lines*, 170 F. (2d) 882, wherein it was held that whether the ship was negligent in respect to the condition and installation of a certain

turnbuckle was a question for the jury. The latter case simply declares the rule to be that the knowledge of the vessel's mate that the ship's gear is defective is imputed to the steamship company as a matter of law. These propositions appear to be elementary and require no further discussion.

It is not clear why appellant relies on *Pietryzk v. Dollar S. S. Lines*, 31 Cal. App. (2d) 584, 1939 A.M.C. 1281. To be sure, the case holds, as claimed, that if the shipowner negligently fails to discover and remove oil he is liable by reason of negligent failure to provide a safe working place. It is significant to note, however, that the shipowner must have been negligent in his failure to discover. The case further goes on to hold that the defense of independent contractor is entirely proper and consistent with the Jones Act:

“The plaintiff does not call our attention to any authority to the effect that the function of cleaning oil tanks is inherently injurious, therefore the duty of performing such work could be delegated. In the absence of express language to the contrary in the Jones Act it did not have the effect of depriving this defendant of the right to rely on the defense that Ah Him was an independent contractor. (13 Cal. Jur. 1045; *American Pacific Whaling Co. ev. Kristensen*, 1938 A.M.C. 449, 93 F. (2d) 17, 20.)”

“In 1908 the Federal Employers' Liability Act was enacted by the Congress. (45 Mason's U.S.C., sec. 51.) It modifies the rules applicable to common carriers in interstate commerce. As to seamen that statute was made applicable by the Jones Act. (46 Mason's U.S.C., sec. 688.) Under

neither of said statutes was the defense of independent contractor expressly abolished. Nor do we find any language in either statute which by implication has that effect as to incidental matters such as cleaning of oil tanks."

At this point appellant again urges that because complaint had been made as to the conduct of two other winchdrivers (it may have been the same man twice) over the course of the three months of loading operations, the shipowner was thereby under constructive notice that the winchdriver at Larsson's winch would prematurely start his winch. We can understand the reason for appellant's persistent repetition of this claim. It is, of course, essential to his case, but the record is devoid of any prior or later claims of negligence upon the part of this stevedore. We are certain, as was the trial Court, that because one or possibly two stevedores on two other occasions (and no more) committed a negligent act, that such does not necessarily mean all the winchdrivers in Shanghai, or all the winchdrivers aboard this vessel were likewise negligent as a matter of law at all times.

Appellant makes the novel point that the master owed him the duty of protecting him to the extent that he should have been provided with an assistant or perhaps, we might suggest, an attendant. The record will show without contradiction that an oiler requires no assistant and such has never been customary or necessary. The implication is, of course, that this engineering officer (Swedish license) of 19 years' experience required a male attendant to show him how

to take eight turns on a small steam valve and thus insure his absolute safety. We think that the argument borders on facetiousness. We respectfully call the Court's attention to the fact that while appellant at page 35 of his brief refers to the "multitude of similar instances" there were but two shown or even testified to by the appellant and his witnesses. Whether two such instances over a long period of time constitutes a "multitude" we leave to the Court. Appellant on page 37 of his brief infers that because it would take one minute longer to make a winch absolutely safe to work on, that this safe practice was not followed because it would consume some of the shipowner's time. There is nothing in the record to show that the shipowner in any way hurried the operations and we believe the Court will take judicial knowledge of the fact that seamen of today are not overly concerned with the shipowner's time. The evidence as has heretofore been pointed out, is absolutely clear that it was a matter for the individual oiler's discretion as to whether he would completely immobilize the winch before working on it.

V.

In support of the theory that appellant was not guilty of negligence or contributory negligence he has of necessity misquoted the record and made statements that are unsupported by the record. Appellant on page 35 of his brief claims, albeit erroneously, that the "multitude of similar incidents," upon the part

of the Chinese stevedores clearly showed the propensity for prematurely starting the winches. He again claims such acts to have been performed "habitually and continuously". On the next page of his brief he supinely claims that he knew nothing of such acts or propensities and presumably therefore was under no compulsion or necessity to show any care whatever for his own safety. His principal argument in support of his claim that there was no negligence on his part, seems to be that it would have taken him one minute or possibly less to completely immobilize the winch and thus make it absolutely safe. There is not one scintilla of evidence in the record that the shipowner objected to this additional one minute of working time or that such would materially affect the ship's operation or would in any way violate the terms of the per diem charter. The fact of the matter is that the longer time the ship was under the per diem charter the longer the shipowner would continue to be paid by the charterer and thus any delay occasioned by the additional one minute would inure to the shipowner's benefit and would not be to his detriment, as the appellant would so artfully have this Court believe.

Appellant seeks freedom from fault by claiming that he was not told that he should close the steam valve. We deem it elementary that a man with 19 years of sea experience who holds a foreign engineer's license does not have to be told that he can stop a winch by turning a simple valve; any elementary grade student knows that it would be safer to work on a winch that had been immobilized than one which

had not. It is further argued that the trial Court found appellant to be negligent upon the basis of the case of *Shields v. United States, supra*. We respectfully submit that the Court made such finding upon the evidence adduced before it, as is clear from the Court's twice considered ruling. Appellant now urges that there is a complete absence of any evidence to show that he had any knowledge of the danger. If appellant did not know that it was possible for a winch-driver to prematurely start a winch then we respectfully submit his *abysmal* ignorance of what he should have known must in itself bar any right to recovery. The arguments of appellant on this phase border on the ridiculous. In support of his theory appellant cites the case of *Roberts v. United Fisheries*, 141 F. (2d) 288. This case involved the death of some seamen who were fishermen. They were fishing from dories when a storm came up and the master failed to call the dory fishermen back to the mother ship. The case holds that there is a question of fact as to whether the captain acted as a reasonable and prudent master under the circumstances. The question involved was one of whether proper or improper orders had been given or the lack thereof and it is in no way here enlightening.

VI.

Appellant in his brief under the caption "Public Policy", claims that he should have a recovery against the shipowner because he was hurt, and also because

his real cause of action against the Chinese stevedores is only illusory, presumably because it would have to be enforced in the Chinese Courts. Such right is far from illusory. Under the unique Chinese law, which would govern the appellant's right against the stevedores in this instance, the only question involved is that of ability to pay. The question of fault is not adjudicated nor at issue, the sole question being whether the plaintiff or the defendant is best able to pay. Assuming that this appellant has less funds than the Chinese Government he would be entitled to a recovery on the basis here urged against the ship-owner, viz., that he suffered an injury. As usual, in support of his theory appellant has cited cases that are in no wise in point. He relies on *Koehler v. Presque-Isle Transportation Co.*, 141 F. (2d) 490, which is a case involving assault of one seaman upon another; the vicious propensity rule was applied. Reliance is likewise placed erroneously on the case of *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424. There a seaman sued for an injury received in a fall in the engine room caused by a defective step on which he stood while on duty when seeking to learn, by touching with his finger, whether an engine bearing was overheated. The Court applied the comparative negligence rule holding that both the vessel and the injured seaman were at fault. *State of Maryland*, 85 F. (2d) 944, has heretofore been commented upon. Suffice it here to say that the only proposition involved in that case was the liability on the part of the vessel for failure to instruct a green and inexperienced seaman as to his duties. Appellant alludes to the fact that

the shipowner could have provided against his liability, if any, by way of insurance; he also refers to the usual hold harmless clauses contained in the per diem charter. His reference to both can be regarded as having been made only for the obvious purpose of injecting the question of insurance into the case with the obvious intent and hope of prejudicing the outcome. Such tactics are not new to jury lawyers nor is their purpose unknown. It goes without saying, that learned judges are unimpressed by these improper methods. We should like to suggest, however, before passing the point, that had appellant been so insurance-minded he could have provided himself with all the accident insurance he cared to purchase.

**THE FINDINGS OF FACT AND CONCLUSIONS OF LAW
ARE FULLY SUPPORTED BY THE EVIDENCE.**

As previously pointed out Judge Dal Lemmon examined with meticulous care the law and evidence relating thereto in this matter. He filed one written opinion on February 28, 1949, and subsequent to the setting aside of the order which followed, the learned judge reconsidered the entire matter and filed a subsequent written opinion on May 24, 1949, affirming his previous decision. All of appellant's theories presented to this Court were urged in the Court below and appropriate Findings of Fact were made thereon. As to appellant's claim that recovery should be allowed because two prior episodes had been experienced with stevedores during the course of the

vessel's three months' loading and unloading operations, the Court very properly points out in its first opinion (Ap. 22) as follows:

“The fact that difficulties had been encountered with Chinese stevedores on a prior visit to Shanghai and there had apparently been some difficulty the day before between a Chinese winch operator and a seaman is not sufficient in the absence of a showing that *this particular operator* was so inefficient as to constitute a hazard to justify classifying the ship as unseaworthy.” (Emphasis supplied.)

Again in his second opinion (Ap. 29 and 29-A), it is stated as follows:

“The factual situation presented herein does not justify a finding of negligence that would be imputed to respondent making it liable to libelant for damages. Taking the evidence most strongly in favor of libelant that on a prior trip difficulties had been incurred with Chinese stevedores and that on this voyage a member of the crew had trouble with another Chinese winch operator the night before the accident complained of herein, this is not sufficient to justify a finding that all Chinese stevedores are negligent or that it was foreseeable that *the particular stevedore* who caused the injury would prove to be incompetent. Negligence may not be attributed to the ship operator for the actions of a Chinese winch operator who until the accident had been operating his winch properly where the libelant had the means furnished to adequately protect himself from the possible contingency that the winch operator would negligently operate the winch when

the libelant was oiling the winch in plain view of the operator.” (Emphasis supplied.)

Nowhere in the record is there a scintilla of evidence or even the slightest suggestion that the offending winchdriver had ever before shown any evidence of recklessness nor did he show any after the accident. The shipowner could not by any means have ascertained that this particular winchdriver was likely to or would prematurely start his winch and was utterly powerless to foresee such possible action; the only person who could have prevented it was the appellant himself who had the power, right and duty to immobilize the winch and make such action impossible. Appellant takes the position that because two of the very great number of stevedores in the three months' loading operations had each once been careless, the shipowner was on notice that all Chinese stevedores had reckless propensities and for that reason became the fellow servants of appellant and thereby imposed liability on the shipowner as the employer of the stevedores. As pointed out in our statement of facts the vessel's winches during the course of this voyage were serviced in at least 260,000 individual operations and the appellant himself oiled or greased the winches at least 1,000 times, which required him to service a minimum of 26,000 operating parts of the vessel's winches. We believe it is startlingly significant that not a single other injury in the entire period was suffered by anyone in connection with the vessel's winches. This fact was testified to by the appellant's witnesses. At the risk of being thought repetitious,

we venture the belief that there is not one stevedoring contracting firm in America that has caused as few as two injuries in three months of operations, and that fact certainly does not prove that all American stevedores have reckless and careless propensities and are therefore per se negligent. Some point is attempted to be made by the appellant that Chinese stevedores conduct their operations somewhat differently than do American stevedores. It is safe to suggest that stevedores the world over differ in every port and in every country, and American efficiency cannot always be had in every foreign port. Such can hardly be charged as a fault of the concerned vessel and certainly cannot be attributed to the vessel's negligence. Appellant does not dispute the fact that each of the vessel's winches was equipped with an individual steam shut-off valve. If this valve is closed and the winch allowed to make a turn or two to allow steam in the piston to clear no stevedore or any human power can cause the winch to move or turn thereafter, and no one can doubt, and the evidence clearly shows that the safest, best and usual way to oil a winch is to first close the valve. If this is done no injury is possible. The appellant's witnesses admit that it was customary to close the winch in American ports during lunch hours or for other periods when the winch-driver was not at his post but the evidence was conflicting whether this was a customary practice while oiling. Chief Engineer Montague testified as follows:

“Q. Then would it be possible for that winch to move as long as the valve was closed?

A. No.

Q. Would that shut off all the steam in the winch?

A. That is right.

Q. Does each winch have a separate valve?

A. Each winch has a separate stop valve, yes.

Mr. Black. That is all." (Tr. 112.)

"Mr. Black. Q. Mr. Montague, it was up to the discretion of the individual oiler as to whether he shut down or not?

A. That is right." (Tr. 115.)

One of the appellant's witnesses, Houston, while denying that it was customary for oilers to touch the valves when oiling, was asked by counsel for appellant on re-direct examination if the valve were closed when working on the winch whether there would be anything to prevent the winchdriver himself from turning the steam valve back on again after the oiler had turned it off. His response was

"A. No, there would be nothing at all to prevent it. *It happens in many cases.*" (Tr. 97.)

The meaning of this answer could be only one thing and that is that the valve is closed in many cases while oiling and greasing even in American ports. Appellant's witnesses likewise admitted that there was no rule against the immobilizing of such winches. Appellant's witness, Herrera, testified as follows:

"Q. There is no rule against closing that valve?

A. That is something I don't know.

Q. Well, you represented the crew on the vessel. Was there any such rule?

A. No." (Tr. 41.)

As to the reasons for immobilizing the winches appellant's witness Houston further testified as follows:

"Q. That couldn't happen if the winch was shut off?

A. That is one purpose of shutting off the winches.

Q. Is it to make that more safe?

A. To see they don't run while there is nobody around.

Q. So an accident won't happen, is that right?

A. Yes.

Q. And that is the usual way of doing it, isn't it?

A. Yes." (Tr. 100.)

The trier of the facts in his second opinion set forth in Apostles 27:

"Libelant here, as libelant in the Shields case, knew about the shutoff valve on the winch and being a man of experience must have known that by its use his job would be rendered absolutely safe. The fact that libelant was not ordered to use the shutoff valve is not negligence upon the part of respondent. The ship owner performed its duty by providing a safe means of performing the work."

We see nothing whatever to libelant's claim that the shipowner failed to give him adequate protection. The shipowner put at appellant's disposal every device required to insure his complete safety and we urge to this Court that the appellant was under duty to take all reasonable means for the protection of his own safety and the greater the danger, the greater the ne-

cessity for care in the preservation of his own safety. As stated by the trial Court, Apostles 22:

“It is not incumbent upon them to treat seamen as if they were in swaddling clothes and incapable of using a modicum of care for their own safety.”

Even the seaman is required to use, at least to some extent, his faculties. While we dislike to dignify appellant's claim that the stevedore became his fellow servant because of the reckless propensities of one or two (it may have been the same one on two occasions) stevedores on earlier occasions, we respectfully submit that the general rule is that an employer of an independent contractor is not liable for the latter's negligent acts, unless perhaps the work contracted for is of an inherently dangerous nature and one calculated to result in injury.

Volume 27 of American Jurisprudence “Independent Contractors—Liability of Employer” discloses the following correct statement of law on pages 504, 505 and 506:

“Generally—Although in some early cases it was thought that the doctrine of respondeat superior applied to the relation between an employer and an independent contractor, the authority of these few cases was soon overwhelmed by many decisions promulgating the general rule that an employer is not liable for the torts of an independent contractor or the latter's servants. This rule of the non-liability of an employer is based upon the theory that the characteristic incident of the relation created by an independent contract is

that the employer does not possess the power of controlling the person employed as to the details of the stipulated work, and it is, therefore, a necessary judicial consequence that the employer shall not be answerable for an injury resulting from the manner in which the details of the work are carried out by the independent contractor. The general rule has also been said to rest upon the ground that a contractor, pending the performance of the work, is, to a certain extent, substituted for the person for whom the work is to be performed. However, the real basis for the rule seems to be public policy."

In the case of *Williams v. Fresno Canal and Irrigation Company*, 96 Cal. 14, decided in 1892, the Court held:

"When A makes an independent contract with B, by which the latter is to do for the former a piece of work in itself harmless, and B does the work so carelessly or unskillfully as to injure a third party, A, as a general rule, is not liable. But when the contract is in its very nature and necessarily injurious to a third party, then the doctrine of respondeat superior applies. In such a case the injury does not result from the manner in which the work is done, but from the fact that it is done at all."

This has always been the law. See:

Shields v. United States, 73 Fed. Supp. 862,
1949 A.M.C. 1357 (C.A. 3);

Pietryzk v. Dollar Steamship Lines, 31 Cal.
App. (2d) 584 at 592, 1939 A.M.C. 1281.

“As to seamen, that statute was made applicable by the Jones Act (46 Mason’s U.S.C. sec. 688). Under neither of said statutes was the defense of independent contractor expressly abolished, nor do we find any language in either statutes which by implication has that effect as to incidental matters such as cleaning oil tanks.”

See also the case of *Green v. Soule*, 145 Cal. 96:

“A building contractor is not liable for the negligence of another independent contractor employed by the owner to do the plumbing and sewer work; nor is he liable for the negligence of an independent subcontractor employed by himself to do the plastering for the building for a specified sum, who agreed to furnish all the materials and labor required to complete the subcontract, and who had the entire charge of that part of the work and sole control of the workmen engaged therein.”

THE SHIELDS CASE IS CONTROLLING.

We respectfully cite to this Court the case of *Shields, et al. v. United States*, 73 F. Supp. 862 (D.C. E.D. Pa., 1947). The facts of that case were much stronger in favor of the seaman than is the factual situation in the matter at bar. While Shields and the appellee were injured in the same manner there were additional specifications of negligence proved in the *Shields* case which are absent in the instant case. In the *Shields* case:

“At No. 2 hatch were two large cargo winches, one on each side of the deck. Each winch had its

own separate control, or throttle, and each winch had a brake. For reasons of convenience, or possibly of economy of manpower, the stevedore had rigged a pair of long wooden handles by means of which one man standing between the two winches could operate both, either simultaneously or separately. This arrangement, the libellant contends, led to an improper method of operation which made it dangerous for a man at work oiling the winches, because the winch operator, standing between the wooden handles, would not be likely to see him unless he turned his head. At the time of the accident the operator was not looking and did not see that Shields was working on the winch, and his starting the winch without warning was one of the two prime causes of the accident, the other being Shields' thrusting of his hand through the flywheel. If there were nothing in the case, other than what has just been described, I would say that the method of operation made the Shields job a dangerous one."

None of the factual situations above referred to in the Shields opinion existed in the matter at bar, and eliminating such factors, the case is on all fours with the present matter. We can do no better than to quote from the opinion of the trial Court as to the facts which are, with the foregoing exception, the same as those claimed by the appellant herein.

"The libellant joined the steamship 'Hannibal Hamlin' as a member of the crew on September 18, 1944. At the time, longshoremen were engaged in loading cargo into the holds and the libellant was assigned to the duty of oiling the deck winches. *On the morning of the third day*

of his employment, while he was oiling the port winch at No. 2 hatch, the machinery was prematurely started by the winch operator, an employee of the stevedore, and the libellant suffered injuries which resulted in the amputation of his left hand and a degree of permanent impairment of the right." (Emphasis supplied.)

In the *Shields* case, there were individual shutoff valves at each winch, as there were in the case at bar. In this connection, the learned District Judge stated as follows:

"(7) It is, of course, a breach of the employer's duty to put a man to work in an unsafe situation over which the man has no control. It is an entirely different thing when the workman has it in his power to make the place safe by a simple and ordinary precaution. The employer's duty must be measured by commonly accepted standards. Work has to be done on pieces of machinery of various types, particularly electrical apparatus, which are extremely dangerous unless they are rendered 'dead' by pulling a switch or closing a valve. In such cases the employer's duty to furnish a safe place to work is fully met if the switch or valve is there and the man knows how to use it—in other words, if the employer has supplied a reasonable and safe method of making the work perfectly safe. The fact that someone other than the workman can create a danger unless the workman takes the normal steps to make the machine safe does not make the employer responsible." (Emphasis supplied.)

The *Shields* case moreover, is interesting in light of testimony of appellant's witnesses, some of whom testified that they had never seen or heard of the safe practice of shutting the steam valves and thusly immobilizing a winch before working on it. The *Shields* case holds such a custom to exist.

Before arriving at the above-quoted conclusion and, thusly, dismissing libellant's libel, the Court had before it the case of *Seas Shipping Company v. Sieracki*, to which appellant devotes many pages of his brief. Judge Lemmon in the instant case also carefully considered the *Sieracki* case and held it inapplicable (Ap. 27-28-29). An examination of the *Shields* case will, we are confident, dispose of appellant's contentions in full.

The *Shields* case was appealed to the United States Court of Appeals, Third Circuit, and decision was rendered May 24, 1949, affirming the decision of the District Court. In its decision the Court of Appeals (1949 A.M.C., at page 1355) reviewed the facts and the law and stated as follows:

"Appellant's main point is that appellee violated its duty in allowing the work to be done in a dangerous fashion and in failing to provide a safe place. We agree that the ship owner's responsibility to furnish a safe place for the crew continues through any hazard created by longshoremen in loading the cargo and engaged by the owner for that purpose. In this connection, as the district judge stated, the method employed by the stevedores in operating the deck winches, if considered by itself, might well be thought

dangerous to Shields in his job. The difficulty is that each winch on the deck of the *Hamlin* had a valve controlling the steam which powered the motor. Shields knew this; specifically he knew that shutting the steam off by turning the valve put the winch out of operation and he frankly stated that he had the right to shut off the steam if necessary in order to oil the winch. He did not shut off the steam to the forward port winch, the one which hurt him, prior to oiling it. Fifteen minutes prior to the accident, the operator of the starboard winch at Shields' direction, had shut off the power while Shields oiled it. In the situation we think it obvious that the district judge was correct in concluding that:

'3. The respondent did not fail in any duty to supply a safe place for the libellant to work. The method of operating the winch adopted by the longshoreman did not render the place where Shields was working unsafe nor make it dangerous for him to oil the winch, so as to place any liability in respect of it upon the respondent.' (Emphasis supplied.)

Even the dissenting opinion by Chief Judge Biggs of the Court of Appeals held that Shields in failing to close the valve controlling the steam supply to the winch was guilty of negligence, but would impose some measure of liability on the shipowner because of the defective winch handle extensions, a factual situation which was not present in the matter at bar.

The *Shields* case being squarely in point, is completely controlling in the instant matter.

CONCLUSION.

We respectfully submit that the trial Court having heard all witnesses testify in person and having resolved all material allegations in favor of appellee and against appellant and being fully supported by the evidence, the decree for the reasons stated should be affirmed.

Dated, San Francisco, California,
November 18, 1949.

JOHN H. BLACK,
EDWARD R. KAY,
HENRY W. SCHALDACH,
Proctors for Appellee.



No. 12314

United States
Court of Appeals
For the Ninth Circuit.

MIKE ERCEG,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court for the Territory District of
Alaska, Fourth Division

FILED

OCT - 5 1949

PAUL P. O'BRIEN,



No. 12314

United States
Court of Appeals

For the Ninth Circuit.

MIKE ERCEG,

Appellant,

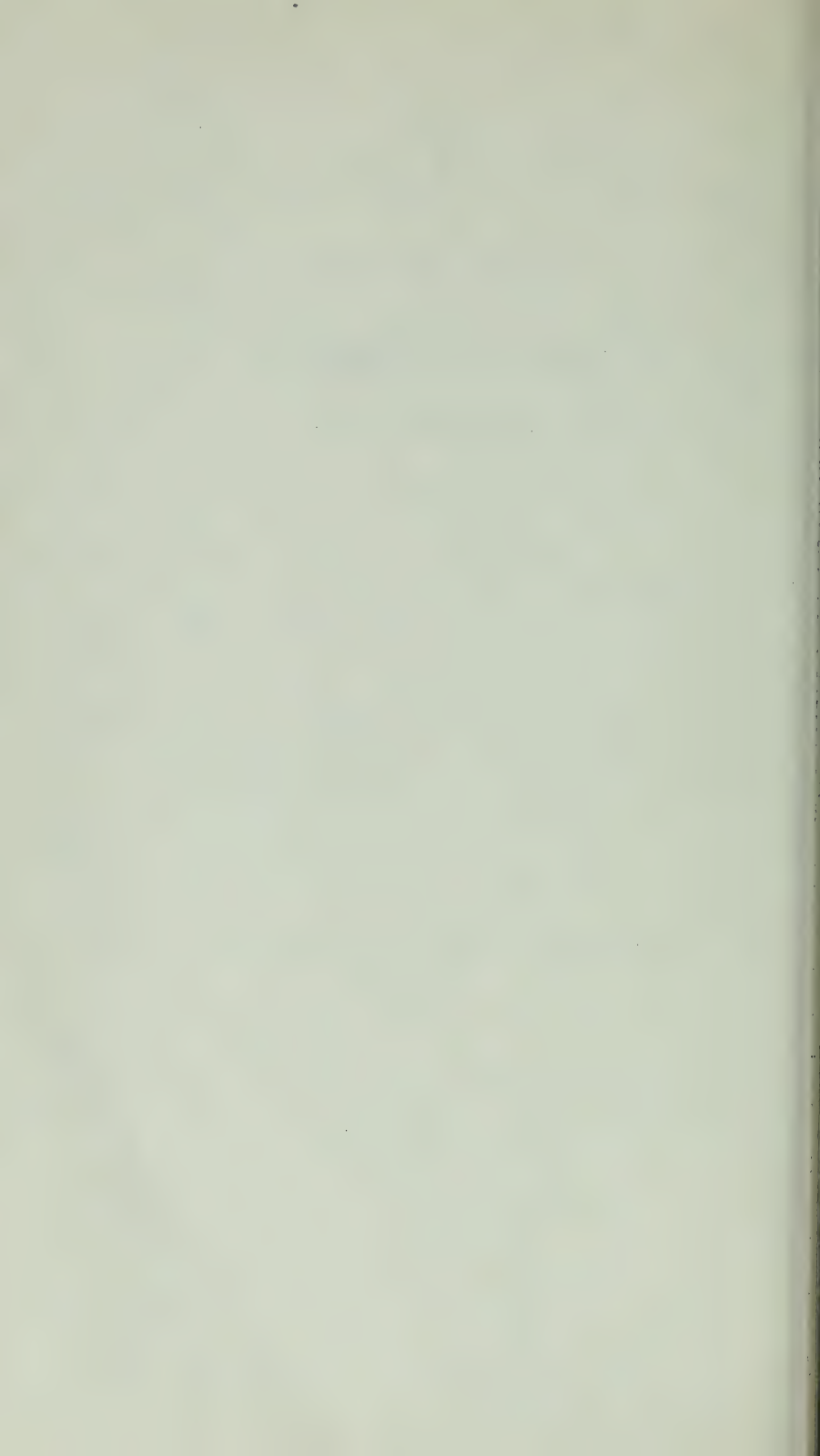
vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

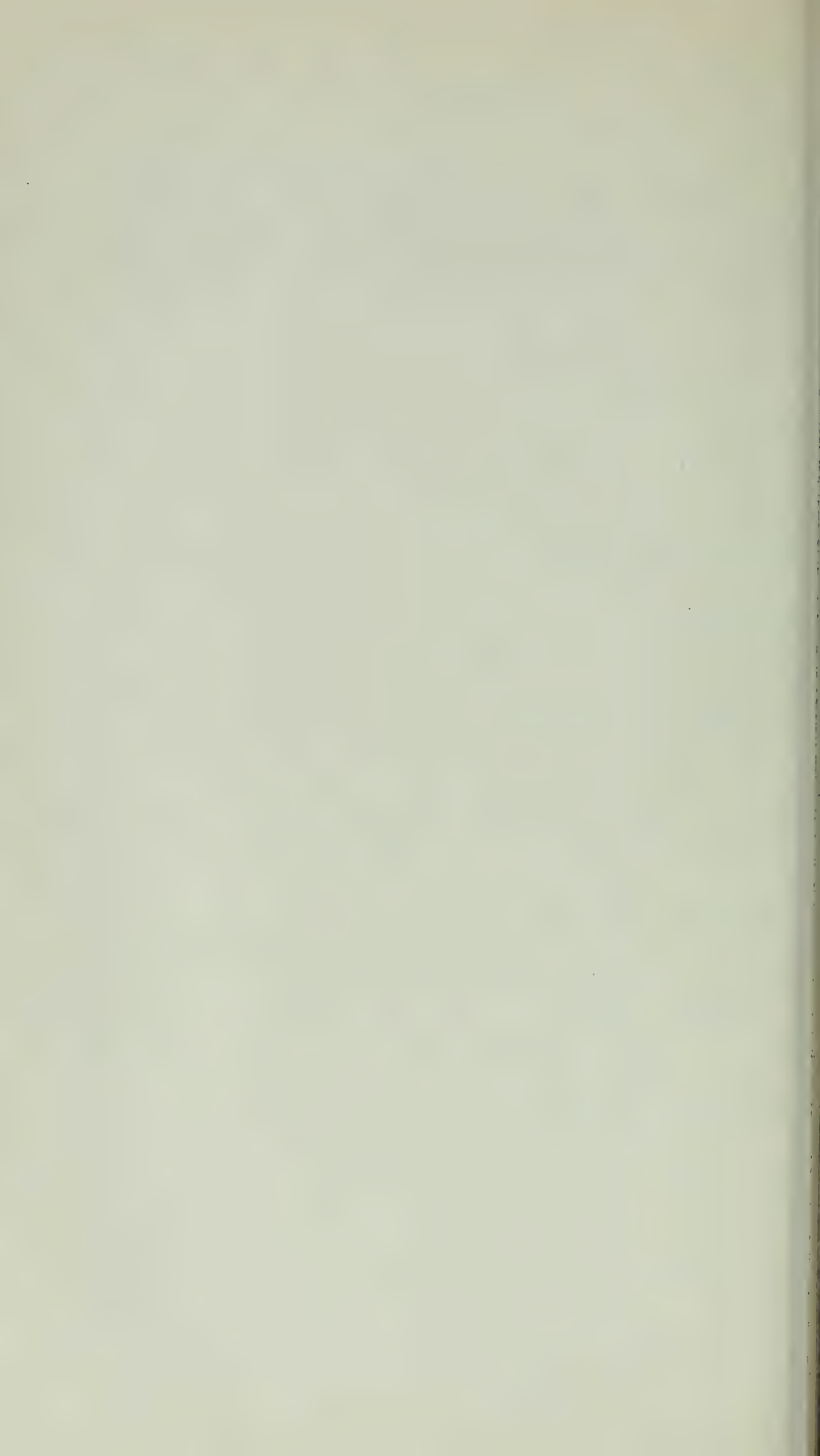
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

ROBERT A. PARRISH,

Fairbanks, Alaska,

Attorney for Plaintiff and Appellant.

HARRY O. AREND,

United States Attorney,

Fairbanks, Alaska,

Attorney for Defendant and Appellee.

In the District Court for the Fourth Division
Territory of Alaska

No. 6143

MIKE ERCEG,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes Now the Plaintiff above named and for cause of action against the above-named Defendant, complains and alleges as follows:

I.

That the above-named Plaintiff presents this, his petition, against the United States of America, Defendant, pursuant to the provisions of Title 41, Section 113-(b) of the United States Code, in accordance with the provisions of Title 28, Section 41, Subsection 20 and as provided by the Judicial Code effective September 1, 1948, Title 28, Section 1346, Subdivision 2, United States Code.

II.

That on the 17th day of July, 1942, the Defendant did operate and was in the process of constructing an Air Base at Big Delta, Alaska, and was in the process of drilling certain water wells at the said base.

III.

That the Plaintiff above named was in the business of operating drilling equipment suitable for the drilling of water wells on the said date, and did own certain drilling equipment hereinafter described, and did reside at Fairbanks, Alaska.

IV.

That on the 17th day of July, 1942, the Plaintiff, and the Defendant by and through its agent, Sidney F. Tate, Jr., acting in the capacity of Resident Engineer, United States War Department, Big Delta, Alaska, made and entered into a contract whereby the Plaintiff agreed to rent unto the Defendant one Keystone Drill #70, with accessory equipment, to be used by the Defendant at Big Delta, Alaska, for the purpose of drilling water wells, and Defendant to pay unto the Plaintiff daily rental of Thirty (\$30.00) Dollars per day, or Nine Hundred (\$900.00) Dollars per month; a copy of said contract being attached hereto and made a part hereof as if incorporated herein, and is marked "Exhibit A." That Plaintiff relies in whole or in part in establishing his cause of action upon the said written contract.

V.

That the Plaintiff has complied with all of his obligations arising under said contract and that the said Defendant did use the said equipment from the 17th day of July, 1942, to the 1st day of December, 1942, in the amount of One Hundred and

Thirty-Four days, making a total amount of rental due to the Plaintiff from the Defendant to be the sum of Four Thousand and Twenty Dollars (\$4,020.00).

VI.

That although demand has been made of the Defendant by the Plaintiff for the said sum of \$4,020.00, the Defendant has administratively denied liability thereof on or about the 22nd day of January, 1949, and has failed and refused to pay the same and the said sum is due and owing to the Plaintiff with interest thereon at the rate of six (6%) per cent per annum from the 1st day of December, 1942.

VII.

That the Plaintiff has been compelled to employ an attorney to prosecute the said action and is entitled thereby to recover a reasonable fee for his attorney, and his costs and disbursements herein expended.

Wherefore, the Plaintiff prays judgment for the sum of Four Thousand and Twenty Dollars (\$4,020.00) with interest thereon at the rate of six (6%) per cent per annum from the 1st day of December, 1942, until paid and for a reasonable fee for his attorney, and his costs and disbursements expended herein.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiff.

United States of America,
Territory of Alaska—ss.

Mike Erceg, being first duly sworn, upon his oath, deposes and says: I am the Plaintiff in the above-entitled action; that I have read the allegations of the Complaint, know the contents thereof, and that the same are true as I verily believe.

/s/ MIKE ERCEG.

Subscribed and sworn to before me this 20th day of April, 1949.

[Seal] /s/ ROBERT A. PARRISH,
Notary Public in and for the Territory of Alaska.
My Commission expires: 2/9/52. [3*]

EXHIBIT A

Agreement

This Agreement, Made and entered into this 16th day of July, 1942, by and between Mike Erceg, of Fairbanks, Alaska, party of the first part, and the Resident Engineer, United States War Department, Big Delta, Alaska, party of the second part,

Witnesseth:

That said party of the first part agrees to rent to said party of the second, and said party of the second part agrees to rent from said party of the first part one Keystone Drill #70, together with all tools, accessory equipment, and parts as described

* Page numbering appearing at bottom of page of original certified Transcript of Record.

in the inventory attached hereto and made a part hereof, to be used by party of the second part for drilling water wells at Big Delta, Alaska, for the term from the 17th day of July, 1942, until all wells at said Big Delta, Alaska, are completed.

Said party of the first part agrees to deliver said drill, tools, equipment, and parts in good condition at Big Delta ready for immediate operation.

Said party of the second part agrees to pay as rental for said drill, tools, equipment, and parts, the sum of Thirty Dollars (\$30.00) per day, or Nine Hundred Dollars (\$900.00) per month, to said party of the first part, and further agrees to operate said drill continuously, unless temporarily delayed by accidental breakage.

That all expense of operation of said drill, and all costs of repair and upkeep of same, or of any of the parts or accessories, including cable, shall be borne by said party of the second part; and said party of the second part agrees to keep said drill, equipment, and parts, in first-class workable condition at all times.

That when all work is completed under this agreement, said party of the second part agrees to deliver to said Mike Erceg, at his [4] yard at Fairbanks, Alaska, at the cost of party of the second part, said drill, with all tools, equipment, and parts in as good condition as the same are now in, reasonable wear and tear excepted, with all breakage, if any, repaired or replaced; but in the event that it is impossible to replace any breakage, said party of the

second part agrees to reimburse party of the first part for same.

Said party of the first part further agrees to loan to said party of the second part two hundred fifteen (215) feet of six-inch casing, X-heavy, to be used by party of the second part in connection with said drilling, and said party of the second part agrees to return the same to said party of the first part at his yard at Fairbanks, Alaska, at the time of delivering said drill; and said party of the second part agrees that in the event of breaking, damaging, or losing said casing, the same will be replaced or repaired at the expense of said party of the second part, or said party of the first part will be reimbursed in full.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written herein.

/s/ MIKE ERCEG,

Party of the First Part.

/s/ SIDNEY F. TATE, JR.,

Title: Resident Engineer. [5]

Drill & Equipment Rented From Mike Erceg,
Fairbanks, Per Agreement Effective 7/17/42

Items

1 Keystone Drill

425' $\frac{3}{8}$ Cable sand line

1 5 Gal. gas can

1 Steam boiler injector

- 1 4' Smokestack
- 1 Screw jack No. 11
- 1 Bar, crow, pinch point 58"
- 6 50 gallon Drums
- 2 1½ 50 gallon drum
- 1 Steam gauge
- 1 Boiler glass
- 7 Globe valves, 5½", 1¼", 1-1"
- 1 Pop-off valve
- 4 6" Drill bits
- 1 Rope socket
- 1 Casing ring
- 1 Anvil & block
- 1 Blacksmith forge with pipe
- 1 Drill, stem, 10'
- 1 Pr. Drilling jars
- 1 Fishing jar
- 1 Drill stem 6' 6½"
- 1 6" Casing puller
- 2 Tool wrenches for 3"
- 1 Johnson bar
- 3 Chain tongs
- 1 Set driving clamps
- 1 Driving head
- 2 Clamp wrenches
- 1 Sand pump 5"—8' long

- 1 Sand pump 7' x 1½"
- 1 Screw jack, no. 2 x 14
- 1 Casing clamp
- 1 Hose 5/8", Approx. 37", high pressure
- 1 5/8" Chain, 13' long
- 1 1½" Chain, 5' long
- 1 3/8" Chain, 6' long
- 1 Length 1½" Cable, Approx. 60' long
- 2 Blocks, wood, 6" x 12" x 4'
- 2 Pcs. wood, 7" x 12" x 8'
- 2 Pcs. wood, 9" x 11" x 5'
- 1 Set cyclone differential hoist, 6 tons
- 1 1/4" screen gold pan
- 1 Gold pan
- 1 Gallows frame for chain hoist
- 1 36" Stilson wrench
- 1 Strap 1" cable for gallows frame
- 6 Casing ring wedges 6"
- 2 Pcs. 2" x 6" x 14'
- 400' 3/4" Steel cable with rope socket
- 6 Pcs. 8" x 8" x 2'
- 1 Step jack
- 1 Boiler suction hose with screen & 1½" valve
- 1 Tool bumper

- 2 Steam casing jacks
- 2 Jack plates
- 1 Pump, steam for jacks
- 1 Lubricator for steam pump
- 1 Casing ring
- 4 4" Casing ring wedges
- 7 Rubber connecting hose with union for connections between diesel jacks
- 1 Pump wrench, $3\frac{3}{4}$ " x 11" long
- 1 Union wrench (handle broken)
- 1 Extra union for diesel jack hose
- 1 $\frac{3}{8}$ " pipe union
- 1 Length of $\frac{3}{4}$ " pipe 8' long with $\frac{3}{4}$ " globe valve
- 1 3 way valve
- 2 Jack shoes with boots
- 1 Steel plate
- 1 Steel plate
- 60 " No. 1 6" Super X Casing
- 60 " No. 2 6" Super X Casing
- 52 $\frac{3}{4}$ " No. 3 6" Super X Casing
- 59 " No. 4 6" Super X Casing
- 57 $\frac{1}{4}$ " No. 5 6" Super X Casing
- 56 $\frac{1}{4}$ " No. 6 6" Super X Casing
- 60 " No. 7 6" Super X Casing
- 60 " No. 8 6" Super X Casing

59 $\frac{1}{2}$ "	No. 9	6"	Super X	Casing
58 $\frac{1}{2}$ "	No. 10	6"	Super X	Casing
56 $\frac{3}{8}$ "	No. 11	6"	Super X	Casing
51 $\frac{3}{4}$ "	No. 12	6"	Super X	Casing
60 "	No. 13	6"	Super X	Casing
59 "	No. 14	6"	Super X	Casing
60 "	No. 15	6"	Super X	Casing
48 $\frac{1}{4}$ "	No. 16	6"	Super X	Casing
60 "	No. 17	6"	Super X	Casing
60 $\frac{1}{4}$ "	No. 18	6"	Super X	Casing
53 $\frac{1}{2}$ "	No. 19	6"	Super X	Casing
60 "	No. 20	6"	Super X	Casing
52 $\frac{1}{4}$ "	No. 21	6"	Super X	Casing
60 "	No. 22	6"	Super X	Casing
60 "	No. 23	6"	Super X	Casing
58 $\frac{3}{4}$ "	No. 24	6"	Super X	Casing
60 "	No. 25	6"	Super X	Casing
58 $\frac{5}{8}$ "	No. 26	6"	Super X	Casing
59 "	No. 27	6"	Super X	Casing
60 $\frac{1}{4}$ "	No. 28	6"	Super X	Casing
60 "	No. 29	6"	Super X	Casing
59 $\frac{1}{4}$ "	No. 30	6"	Super X	Casing
60 $\frac{1}{8}$ "	No. 31	6"	Super X	Casing
59 "	No. 32	6"	Super X	Casing
60 "	No. 33	6"	Super X	Casing

- 60 " No. 34 6" Super X Casing
- 60 " No. 35 6" Super X Casing
- 60 " No. 36 6" Super X Casing
- 58 $\frac{3}{4}$ " No. 37 6" Super X Casing
- 60 " No. 38 6" Super X Casing
- 60 " No. 39 6" Super X Casing
- 60 " No. 40 6" Super X Casing
- 60 " No. 41 6" Super X Casing
- 60 $\frac{1}{8}$ " No. 42 6" Super X Casing
- 60 " No. 43 6" Super X Casing
- 60 " No. 44 6" Super X Casing
- 60 " No. 45 6" Super X Casing
- 60 " No. 46 6" Super X Casing
- 59 " No. 47 6" Super X Casing
- 72 " No. 48 6" Super X Casing
- 60 " No. 49 6" Super X Casing
- 56 $\frac{1}{4}$ " No. 51 6" Super X Casing
- 60 " No. 50 6" Super X Casing
- 1 6" Steelshoe [6]

Drill & Equipment Rented From Mike Erceg
Fairbanks, Per Agreement, Effective 7/17/42

Inventory Tool Box

- 11 Wrenches—S Types, Double End
- 2 Wrenches—Stillson 14" & 18"
- 1 Bar Chisel 20"

- 2 Crescent wrenches 10" & 8"
- 1 Wrench, monkey
- 2 Chisels
- 2 Punches, square drift
- 1 Punch, round drift
- 1 Pr. Tin snips
- 1 Bit brace
- 1 Screw driver 16"
- 1 Chisel, cold cut blacksmith
- 1 Hammer, blacksmith
- 1 File, round 16"
- 1 File, round 11"
- 1 File, flat 14"
- 2 Files, flat 12"
- 1 File, half round 11"
- 1 File, flat, 8"
- 1 File, 3 corner 8"
- 1 File, 8"—Knife type
- 1 Babbitt ladle
- 1 Chisel, Blacksmith w/o handle
- 1 Chisel, wood 1" (New)
- 1 Hacksaw with blade
- 2 Hose clamps, 1 large, 1 small
- 4 Sand pump gaskets
- 2 Guns, grease

- 1 Brush, steel
- 1 Brush, wood handle
- 2 Belts, Fan motor
- 4 Links, Drill chain No. 470
- 3 Springs for Jack Motor
- 3 Clevis clamps
- 1 Tape, Lufkin, 75'
- 1 Clamp cable
- 2 lbs. Babbitt
- 4 Bits, wood
- 1 Link, connecting No. 133
- 3 Wrenches, set screw
- 1 Gas faucet $\frac{3}{4}$ "
- 9 Bolts, cap screw $\frac{3}{8}$ " x 1"
- 3 Bolts, cap screw $\frac{3}{16}$ " x 1"
- 5 Bolts, stove, 1"
- 12 Lock washers, $\frac{1}{4}$ "
- 5 Spring washers, $\frac{1}{4}$ "
- 2 Spring washers, $\frac{3}{8}$ "
- 21 Spring washers, $\frac{1}{2}$ "
- 2 Flat washers, $\frac{1}{2}$ "
- 14 Spring washers, $\frac{5}{8}$ "
- 12 Flat washers, $\frac{5}{8}$ "
- 9 Washer springs, $\frac{3}{4}$ "
- 6 Washers, flat $\frac{3}{4}$ "

- 4 Washers, flat 1"
- 25 Nuts, $\frac{1}{2}$ " mixed
- 30 Nuts, $\frac{3}{8}$ " mixed
- 2 Nuts, $\frac{5}{8}$ " mixed
- 1 Washer spring $1\frac{1}{2}$ "
- 3 Blades, Hacksaw 10"
- 1 Blade, Hacksaw 12"
- 10 Bolts, $\frac{3}{8}$ "
- 8 Bolts, $\frac{7}{16}$ " x 2"
- 4 Bolts, $\frac{1}{2}$ " x 5"
- 3 Bolts, $\frac{1}{2}$ " x 1"
- 3 Bolts, $\frac{1}{2}$ " x 2"
- 6 Bolts, Octagon $\frac{1}{2}$ " x 2"
- 6 Bolts, $\frac{5}{8}$ " x 2"
- 1 Bolt, $\frac{1}{2}$ " x 1"
- 1 Wrench socket, Friction
- 2 Bolts, $\frac{1}{2}$ " x 12"
- 4 Bolts, $\frac{1}{2}$ " x 4"
- 14 Bolts, $\frac{5}{8}$ " x 4"
- 3 Bolts, Galv. $\frac{3}{8}$ " x 14"
- 5 Bolts, $\frac{3}{4}$ " x 14"
- 4 Bolts, $\frac{3}{4}$ " x $4\frac{1}{2}$ "
- 3 Bolts, $\frac{3}{4}$ " x 3"
- 1 Bolt, $\frac{3}{4}$ " x $2\frac{1}{2}$ "
- 1 Bolt, $\frac{1}{2}$ " x 6"

- 2 Bolts, $\frac{1}{2}$ " x $\frac{1}{2}$ "
- 20 Nuts, $\frac{5}{8}$ "
- 1 Poker, Blacksmith $\frac{1}{2}$ " x 3'
- 1 Wrench, Pitman
- 2 Nuts, $\frac{3}{4}$ "
- 1 Bolt, $\frac{3}{4}$ "
- 11 Links, chain
- 3 Cast washers
- 1 Hammer, claw
- 1 Lead strip, 11" x 3"
- 1 Chain tongs 25"
- 1 Tape, tire $\frac{1}{2}$ roll
- 1 Steel piece, $3\frac{3}{4}$ " x $7\frac{1}{16}$ "
- 1 Can, oil, copper
- 1 Bar, Jads, 14"
- 1 Level, steel
- 400' Cable $\frac{5}{8}$ "
- 100' Cable $\frac{1}{4}$ "
- 1 Sledge, 12 lbs.
- 1 Pr. Pliers, Lineman
- 15' Cable $\frac{1}{2}$ " [7]
- No. 70: 1 Keystone drill, steel welded
gasoline motor.....\$4,500.00
- 1 Rope socket..... 75.50

United States of America

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1	Drill Stem.....	115.00
1	Sinking Bar.....	77.25
3	Drill Bits.....	225.00
1	Drill Jars.....	112.50
1	5" x 8 ft. long, sand pump....	75.00
2	Tool Wrenches.....	84.00
1	Set Drive Clamps.....	57.50
2	Clamp Wrenches.....	22.50
1	Casing Clamp.....	16.50
1	Tool Wrench Tightening Bar with Chains (Chain Wrench Bar)	15.50
1	Pipe Pulling Ring with Wedges	122.50
1	Lifting Jack.....	40.50
2	21½" x 14 Screw Jacks (2 Ft. over-all)	16.80
1	Bit Gauge.....	3.55
1	400 Ft. ¾" L. Steel Cable....	144.00
1	400 Ft. ⅝" L. Cable.....	120.00
1	300 Ft. ⅜" Steel Sand Line Cable	42.00
2	Vulcan Pipe Wrenches, #34.	44.00

Total\$5,909.60

/s/ HOWARD H. MILLER.

[Endorsed]: Filed April 21, 1949. [8]

[Title of District Court and Cause.]

SUMMONS

The President of the United States of America,
Greeting:

To the Above Named Defendant..

You Are Hereby Required to appear in the District Court for the Territory of Alaska, Fourth Division, within thirty days after the day of service of this summons upon you, and answer the complaint of the above named plaintiff.., a copy of which is herewith delivered to you; and unless you so appear and answer, the plaintiff.. will take judgment against you as demanded in said complaint, to wit: for the recovery of money and damages arising out of breach of contract in the sum of Four Thousand and Twenty (\$4,020.00) Dollars, together with interest thereon at the rate of six (6%) per annum from the 1st day of December, 1942, and for a reasonable attorney fee and the costs and disbursements expended herein.

Witness, the honorable Harry E. Pratt, Judge of said Court, this 21st day of April in the year of our Lord one thousand nine hundred and forty nine.

[Seal] /s/ JOHN B. HALL,
Clerk,

By /s/ OLGA T. STEGES,
Deputy Clerk. [9]

MARSHAL'S RETURN

United States of America,
Territory of Alaska, Fourth Division—ss.

I Hereby Certify, That I received the foregoing Summons on the 21st day of April, 1949, and that I duly served the same on the therein named defendant.. United States of America by and through Harry O. Arend, United States Attorney at Fairbanks, Alaska, on the 21st day of April 1949, and at....., Alaska, on the..... day of.....194.. by then and there delivering personally to Harry O. Arend, United States Attorney, defendant, a copy of said Summons and a copy of said Complaint, certified to be such copy by the plaintiff's attorney of record and by mailing a copy of said Summons and copy of Complaint certified to be such copy by the plaintiff's attorney of record, via registered mail to the Attorney General as provided by Rule 4(c) and Rule 4(d) (4) Code of Civil Procedure.

Marshal's Fees \$3.00.

STANLEY J. NICHOLS,

U. S. Marshal, Fourth Div.

By STEVEN A. MIKULAS,

Deputy.

Post Office Return Receipt attached.

[Endorsed]: Filed April 28, 1949.

[Title of District Court and Cause.]

DEMURRER

Comes now the above named defendant and demurs to the complaint on file herein for the following reasons:

1. That the Court has no jurisdiction of the subject matter of the action; and
2. That the action has not been commenced within the time limited by the laws of the Territory of Alaska.

HARRY O. AREND,

U. S. Attorney.

Service acknowledged.

[Endorsed]: Filed May 25, 1949. [10]

[Title of District Court and Cause.]

NOTICE OF HEARING

To: Harry O. Arend, United States District Attorney, Fairbanks, Alaska, Attorney for Defendant.

You are hereby notified that, on the 27th day of May, 1949, at hour of 1:30 p.m., or as soon thereafter as the same can be heard, the issue in the above entitled cause raised by the Demurrer will be brought on for hearing.

Dated this 25th day of May, 1949.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiff.

Service acknowledged.

[Endorsed]: Filed May 25, 1949. [11]

[Title of District Court and Cause.]

ORDER RE DEMURRER

The Court having on May 27, 1949, heard arguments on a Demurrer to the Complaint in this cause and now being fully advised in the premises, it was Ordered that the demurrer be overruled as to the first ground, but sustained on the second ground.

Entered June 6, 1949. [12]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

Comes Now, Mike Erceg, the above named Plaintiff, and considering himself aggrieved by the order of the above entitled Court made and entered herein on the 6th day of June, 1949, said order being in favor of the Defendant and against the Plaintiff in the sustaining of the Demurrer of the Defendant that the above action has not been commenced within the time limited by the laws of the Territory of Alaska, and said Plaintiffs having given due Notice of Appeal from said order to the Ninth Circuit Court of Appeals of the United States of America setting in San Francisco, California, for the reasons specified and set forth in the said order of said Court, Assignment of Errors and Notice of Appeal on file herein; does respectfully pray that the said appeal petitioned for herein may be al-

lowed and that a transcript of the records, proceedings and papers upon which said order was entered and made be duly authenticated by the Clerk of the above entitled Court and sent to the Ninth Circuit Court of Appeals of the United States of America, at San Francisco, California; and said Plaintiff does further pray that said order be set aside and reversed, and that the cause be returned to the [13] above entitled Court and that jurisdiction be taken herein and the Demurrer of the Defendant be overruled, and further that the above entitled Court fix the amount of the Appeal Bond to be filed herein.

Dated at Fairbanks, Alaska, this 29th day of June, 1949.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiff.

Service acknowledged.

[Endorsed]: Filed June 29, 1949. [14]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes Now, the Plaintiff above named, Mike Erceg, by and through his attorney, Robert A. Parrish, and for assignment of errors alleges and states:

I.

That the above entitled Court erred in sustaining the Demurrer of the Defendant herein, on the

grounds that the action has not been commenced within the time limited by the laws of the Territory of Alaska.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiff.

Service acknowledged.

[Endorsed]: Filed June 29, 1949. [15]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO NINTH CIRCUIT
COURT OF APPEALS, UNITED STATES
OF AMERICA

Notice is hereby given that the above named Plaintiff, Mike Erceg, hereby appeals to the Ninth Circuit Court of Appeals of the United States of America, from the order of the above entitled Court entered on the sixth day of June, 1949, sustaining the Demurrer of the Defendant in said action, on the grounds that the action has not been commenced within the time limited by the laws of the Territory of Alaska.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiff.

Service acknowledged.

[Endorsed]: Filed June 29, 1949. [16]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING
AMOUNT OF APPEAL BOND

Now on this 2nd day of July, 1949, the same being one of the days of General Term of this Court, this cause came on regularly to be heard upon the Petition of the Plaintiff, Mike Erceg, for the allowance of an appeal on behalf of said Plaintiff from the order entered in said cause on the 6th day of June, 1949, sustaining the Demurrer of the Defendant on the grounds that the action has not been commenced within the time limited by the laws of the Territory of Alaska, therefore,

It Is Hereby Ordered that the appeal of the Plaintiff from the order entered herein on the 6th day of June, 1949, sustaining the Demurrer of the Defendant on the ground that the action has not been commenced within the time limited by the laws of the Territory of Alaska, be, and the same is allowed to the United States Court of Appeals for the Ninth Circuit and that a certified transcript of the record, proceedings, orders, judgment, testimony and all other proceedings in said matter on which said order appealed from is based, be transferred, duly authenticated to the United States Court of Appeals for the Ninth Circuit and therein filed and said cause docketed on or before forty (40) days from this date to be heard at San Francisco, California; and [17]

It Is Further Ordered that the amount of the

Appeal be, and is hereby fixed at the sum of Two Hundred Fifty Dollars (\$250.00).

It Is Further Ordered that the said Plaintiff shall file a bond to be approved by the above entitled Court within five (5) days from the date of this order.

Done in Chambers on this 2nd day of July, 1949.

/s/ HARRY E. PRATT.

Service acknowledged.

Entered July 2, 1949.

[Endorsed]: Filed July 2, 1949. [18]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That I, Mike Erceg, the above named Plaintiff, and August A. Johnson and B. B. Holtrop, as sureties, of Fairbanks, Alaska, are held and firmly bound unto the United States of America, in the sum of Two Hundred Fifty Dollars (\$250.00), lawful money of the United States of America, to be paid to said United States of America, for the payment of which well and truly to be made, we bind ourselves, our successors, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of July, 1949.

The condition of the above obligation is such that:

Whereas the above bounden Plaintiff has filed his Petition for Appeal and is about to appeal to

the United States Court of appeals for the Ninth Circuit, from that certain order in favor of the above named Defendant, the United States of America, entered in the above entitled Court and cause on the 6th day of June, 1949, and

Whereas said Plaintiff desires to appeal from said order and the whole thereof, to the United States Court of Appeals for the Ninth Circuit to reverse said order and judgment, and has given Defendant [19] in said Action Notice of Appeal as required by law, and said Court having duly fixed the amount of Cost Bond at Two Hundred Fifty Dollars (\$250.00).

Now, Therefore, if Plaintiff above named should prosecute said appeal to effect and answer all costs that may be adjudged against him if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

/s/ MIKE ERCEG,
Plaintiff,

/s/ AUGUST A. JOHNSON,

/s/ B. B. HOLTROP,
Sureties.

United States of America,
Territory of Alaska—ss.

August A. Johnson and B. B. Holtrop each being first duly sworn, upon his oath deposes and says:

That I am a resident of Fairbanks, in the Fourth Judicial Division, Territory of Alaska, that I am not an attorney, Counsel at Law, Judge, Marshal,

Clerk, Commissioner, or other officer of any Court;
that I am worth the sum of Five Hundred Dollars
(\$500.00) over and above all my just debts and
obligations, in property not exempt from execution
situate in the Territory of Alaska.

/s/ AUGUST A. JOHNSON,

/s/ B. B. HOLTROP.

Subscribed and sworn to before me this 6th day
of July, 1949.

/s/MARIE L. ACORD,

Notary Public in and for Alaska.

My Commission Expires 3/18/53.

This above bond approved this 7th day of July,
1949.

/s/ HARRY E. PRATT,

District Judge.

Service acknowledged.

[Endorsed]: Filed July 7, 1949. [20]

[Title of District Court and Cause.]

CITATION OF APPEAL

The President of the United States of America
To the Protestants, United States of America, and
its attorneys, Harry Arend, and the Attorney Gen-
eral of the United States of America.

You are hereby cited to be and appear in the
United States Court of Appeals for the Ninth Cir-
cuit, to be holden in the City of San Francisco,

State of California, within forty days from the date of this Citation, pursuant to an order allowing an appeal, made and entered in the above entitled cause on the 2nd day of July, 1949, in which the Plaintiff is Petitioner and appellant, and the United States of America is appellee, to show cause, if any there be, why the order entered in this cause on the 6th day of June, 1949, in favor of appellee and against appellant herein should not be set aside and reversed, and why speedy justice should not be done to said Petitioner and appellant above named in that behalf.

Witness the Honorable Fred A. Vinson, Chief Justice of the Supreme Court of the United States of America, on this 8th day of July, 1949.

/s/ HARRY E. PRATT,
District Judge.

Service acknowledged.

Entered July 8, 1949.

[Endorsed]: Filed July 8, 1949. [21]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

On the Motion of Robert A. Parrish, counsel for the plaintiff, Harry O. Arend, U. S. Attorney, being present and consenting thereto, it was Ordered that the time for the plaintiff to file the proposed Bill of Exceptions in this Cause be extended to October 25, 1949.

Entered July 20, 1949. [22]

[Title of District Court and Cause.]

PRAECIPE

To: The Clerk of the District Court, Fourth Division, Territory of Alaska.

You will please prepare a transcript of record of the above entitled cause to be filed in the United States Court of Appeals for the Ninth Circuit, United States of America, setting at San Francisco, California, upon the appeal heretofore perfected in the above entitled cause, including therein the following papers:

1. Complaint with Exhibits
2. Summons and return thereof
3. Demurrer of Defendant filed May 25, 1949
4. Notice of Hearing on said Demurrer
5. Order regarding said Demurrer
6. Petition for Allowance of Appeal
7. Assignment of Errors
8. Notice of Appeal to Ninth Circuit Court of Appeals, United States of America
9. Order Allowing Appeal and Fixing Amount of Appeal Bond
10. Cost Bond on Appeal
11. Citation on Appeal

12. Order Allowing Additional Time for Filing Bill of Exceptions

13. Praecipe [23]

This transcript is to be prepared as required by law and the rules and order of this Court and the Ninth Circuit Court of Appeals, United States of America, and is to be forwarded to the Ninth Circuit Court of Appeals at San Francisco, California, so that it may be docketed on or before the 11th day of August, 1949, pursuant to the Order granting Appeal of the District Court, Fourth Judicial Division, Territory of Alaska, dated the 2nd day of July, 1949.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiff.

Service acknowledged.

[Endorsed]: Filed July 25, 1949. [24]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF THE DISTRICT COURT TO TRANSCRIPT OF RECORD

I, John B. Hall, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, do hereby certify that the foregoing, consisting of 24 pages, constitutes a full, true, and correct transcript of the record on appeal in Cause No. 6143, entitled Mike Erceg, Plaintiff, versus United States of America, Defendant, and was made pursuant to

and in accordance with the Praeceptum of the Plaintiff and Appellant, filed in this action, and is the return thereof in accordance therewith, and

I do further certify that the Index thereof, consisting of page "a," is a correct Index of said Transcript of Record, and that the list of attorneys, as shown on page "b", is a correct list of the attorneys of record; also that the cost of preparing said transcript and this certificate, amounting to \$3.20, has been paid to me by counsel for appellant in this action.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court this 27th day of July, 1949.

[Seal] /s/ JOHN B. HALL,
Clerk, District Court, Territory of Alaska, 4th Div.

[Endorsed]: No. 12314. United States Court of Appeals for the Ninth Circuit. Mike Erceg, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the Territory District of Alaska, Fourth Division.

Filed August 1, 1949.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 12,314

IN THE

United States Court of Appeals
For the Ninth Circuit

MIKE ERCEG,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF OF APPELLANT.

ROBERT A. PARRISH,

224-226 Lavery Building, Fairbanks, Alaska,

Attorney for Appellant.

FILED

OCT 10 1949

PAUL P. O'BRIEN,

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Assignment of Error No. I.

The court erred in sustaining the demurrer of the defendant to the complaint of the plaintiff upon the ground that the action has not been commenced within the time limited by the laws of the Territory of Alaska	3
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Table of Authorities Cited

Cases	Pages
Alaska Pacific Fisheries v. Territory of Alaska (1919), 249 U.S. 53, 39 Supreme Court 208, 63 Lawyers Edition 474..	3
Bruce v. Murray (C.C.A. 9th, 1903), 123 Fed. 366, 59 C.C.A. 494	3
Moller v. Moller (1946), 66 Federal Supplement 507.....	3

Statutes

Compiled Laws of Alaska, 1949, Article 53, Chapter 2, Section 1	2
Contract Settlement Act of 1944.....	5
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No. 12,314

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MIKE ERCEG,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT.

This is an action brought by the plaintiff against the United States of America pursuant to the provisions of Title 41, Section 113b of the United States Code, in accordance with the provisions of Title 28, Sub-Section 20, and as provided by the Judicial Code of the United States, effective September 1, 1948, Title 28, Section 1346, Sub-Division (2).

The complaint alleges that on the 17th day of July, 1942 the United States of America was constructing an army base at Big Delta, Alaska, and that, through the necessity of drilling water wells in connection with the base, the resident engineer of the War Department at said base, contracted with the plaintiff to lease drilling equipment of the plaintiff's and to pay unto

the plaintiff rental of \$30.00 per day, or \$900.00 per month, and a written agreement thereof was entered into. This action is to recover the sum of Four Thousand and Twenty Dollars (\$4,020.00) and interest resulting from unpaid rentals. The complaint further shows that the defendant administratively denied owing this sum of money on the 22nd day of January, 1949. This action was brought and service obtained upon the defendant on the 21st day of April, 1949, within ninety days after the delivery to the plaintiff of the findings of the administrative agency of the defendant. (See Marshal's Return Transcript P. 19.)

To this complaint, the defendant filed a demurrer on two grounds: first, that the Court has no jurisdiction of the subject matter of the action; and, second, that the action has not been commenced within the time limited by the laws of the Territory of Alaska. The Court overruled the demurrer of the defendant as to the first ground, but sustained on the second ground. From this order sustaining the demurrer of the defendant on the ground that the action was not commenced within the time limited by the laws of the Territory of Alaska the plaintiff brought this appeal.

JURISDICTIONAL STATEMENT.

The District Court for the Territory of Alaska is a Court of general jurisdiction, civil, criminal, and also shall have admiralty jurisdiction. (Article 53, Chapter 2, Section 1, Compiled Laws of Alaska, 1949.)

The Circuit Court of Appeals, Ninth Circuit, has appellate jurisdiction to review by appeal the decisions of the District Courts of Alaska. (Title 28, United States Code, Judiciary and Judicial Procedure, effective September, 1948, Chapter 83, Section 1291 and Section 1294.)

In the Act of June 6, 1900, jurisdiction of the District Court was made general in "civil, criminal, equity, and admiralty cases", and is the same as that of District Courts of the United States.

Alaska Pacific Fisheries v. Territory of Alaska (1919) 249 U.S. 53, 39 Supreme Court 208, 63 Lawyers Edition 474;

Bruce v. Murray (Circuit Court of Appeals, C.C.A. 9th, 1903) 123 Fed. 366, 59 C.C.A. 494;

Moller v. Moller (1946) 66 Federal Supplement, 507.

ASSIGNMENT OF ERROR NO. I.

THE COURT ERRED IN SUSTAINING THE DEMURRER OF THE DEFENDANT TO THE COMPLAINT OF THE PLAINTIFF UPON THE GROUND THAT THE ACTION HAS NOT BEEN COMMENCED WITHIN THE TIME LIMITED BY THE LAWS OF THE TERRITORY OF ALASKA.

As before stated, the plaintiff seeks to recover against the United States of America, under the authority granted by Title 41 of the United States Code, entitled "Public Contracts", under what is more commonly known as the Contract Settlement Act of 1944, in accordance with the provisions laid down in

Title 28 of the United States Code. The principal question raised by the demurrer is whether plaintiff is entitled to bring this suit under the provisions of Title 41, United States Code, as provided by Section 113b and c (2), which allows a war contractor aggrieved by the findings of the contracting agency to initiate proceedings in accordance with 113b within ninety days after delivery to him of findings by the contracting agency.

Our contention is that the plaintiff is a war contractor and as such is entitled to bring this action within ninety days after delivery to him of the findings of the contracting agency. The policy of the Contract Settlement Act is particularly set out in:

“a. To facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;

“b. To assure prime contractors and sub-contractors, small and large, speedy and equitable final settlement of claims under terminated war contracts and adequate interim financing until such settlement.” (Title 41, Section 101, United States Code Annotated.)

Section 1346 of Title 28, United States Code: In suits where the United States is defendant provides, “that the District Courts shall have original jurisdiction concurrent with the Court of Claims of (1) any civil action against the United States for the recovery of any internal revenue tax * * * *and* (2)

any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of any executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(Title 28, Sec. 1346, U.S.C. 1948.)

The Contract Settlement Act of 1944 provides that “whenever any war contractor is aggrieved by the findings of a contracting agency on his claim, or part thereof, or by its failure to make such findings in accordance with sub-section (a) of this section he may at his election (1) appeal to the Appeal Board in accordance with sub-section (d) of this section; or (2) *bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States District Court, in accordance with Sub-Section (20) of Section 41, Title 28, except that, if the contracting agency is the Reconstruction Finance Corporation or any corporation organized pursuant to Sections 601-617 of Title 15, or any corporation owned or controlled by the United States, the suit shall be brought against such corporation in any Court of competent jurisdiction in accordance with existing laws.*

(Title 41, Section 113b.)

Title 41, Section 113c (2) provides in Sub-Section 2 that “a war contractor may initiate proceedings in accordance with Sub-Section (b) of this Section (i) within ninety days after delivery to him of the find-

ings of the contracting agency, or (ii) in case of protest or appeal within the agency, within ninety days after the determination of such protest or appeal, or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with Sub-Section (b) of this Section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim."

(Title 41, Section 113c (2).)

A "war contractor" is defined as: "and the term war contractor means any holder of one or more war contracts".

(Title 41, Section 103c.)

The term "war contract" is defined as: "a prime contract or a sub-contract".

(Title 41, Section 103c.)

The term "prime contract" is defined as: "any contract, agreement, or purchase order heretofore or hereafter entered into by a contracting agency and connected with or related to the prosecution of the war; and the term prime contractor means any holder of one or more prime contracts".

(Title 41, Section 103a.)

The term "sub-contract" is defined as: "any contract, agreement, or purchase order heretofore or hereafter entered into to perform any work, or make or furnish any material to the extent that such work

or material is required for the performance of any one or more prime contracts or of any one or more other sub-contracts; and the term sub-contractor means any holder of one or more sub-contracts”.

(Title 41, Section 103b.)

The term “material” is defined as: “including any article, commodity, machinery, equipment, accessory, part, component, assembly, work in process, maintenance, repair, and operating supplies, and any product of any kind”.

(Title 41, Section 103e.)

The term “government agency” is defined as: “any executive department of the government, or any administrative unit, or sub-division thereof, any independent agency, or any corporation owned or controlled by the United States in the executive branch of the government, and includes any contracting agency”.

(Title 41, Section 103f.)

The term “contracting agency” means: “any government agency which has been or hereafter may be authorized to make contracts pursuant to Section 611 of Appendix to Title 50, and includes the Reconstruction Finance Corporation and any corporation organized pursuant to Sections 601-617 of Title 15, the Small War Plants Corporation and the Secretary of Commerce”.

(Title 41, Section 103g.)

Section 611 of Title 50, Appendix of the U.S.C., enacted December 18, 1941, Chapter 593, Title 2, Section 201, 55 Statutes 839, provides that “the Presi-

dent may authorize any department or agency of the government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make, advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendments, or modifications of contracts whenever he deems such action would facilitate prosecution of the war * * *’.

(Title 50, Section 611.)

Executive Orders coordinating bureau offices, etc., No. 901, is set out in part as follows: “The successful prosecution of the war requires an all-out industrial mobilization in order that the materials necessary to win the war may be produced in the shortest possible time. To accomplish this objective it is necessary that the Departments of the War and the Navy and the United States Maritime Commission cooperate to the fullest possible degree with the Office of Production Management in the endeavor to make available for the production of war material all industrial resources of the country. It is expected that in the exercise of powers hereinafter granted, these agencies and the Office of Production Management will work together to bring about the conversion of manufacturing industries to war production, including the surveying of war potential of industries, plant by plant; the spreading of war orders; the conversion of facilities; the assurance of efficient and speedy

production; the development and use of sub-contracting to the fullest extent and the conservation of strategic materials.

TITLE I.

1. By virtue of the authority in me vested by the Act of Congress, entitled 'An Act to Expedite the Prosecution of the War Effort', approved December 18, 1941, (hereafter called the 'Act') (Sec. 601 et seq. of this Appendix), and as President of the United States and Commander in Chief of the Army and Navy of the United States and deeming that such action will facilitate the prosecution of this war, I do hereby order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are authorized within the limits of the amounts appropriated therefor, to enter into contracts and into amendments and modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment or modification of contracts * * *.

2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders or otherwise) for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of war or for the invention, development, or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind or any

portion thereof including plans, spare parts, and equipment therefor, materials, supplies, facilities, utilities, machinery, machine tools, and any other equipment without any restriction of any kind either as to type, character, location or form.”

It follows, therefore, that if, in the year 1941, the War Department was established as a contracting agency by Executive Order to enter into the kinds of contracts referred to above, and the War Department by and through its agent, the Resident Engineer of the United States Army Air Base, entered into a contract with the plaintiff to furnish equipment for the construction of this air base in the year 1942, during the period of the last war, that such a contract is certainly relating to the prosecution of the war, and that the plaintiff, being a holder of such a contract thereby became a war contractor and as such, if he brings his action within ninety days after the delivery to him of findings by the contracting agency of which he is aggrieved, is entitled to the benefit of Section 113b of Title 41. The Statute of Limitations of the Territory of Alaska would, therefore, appear not to be applicable in this case.

Wherefore, appellant prays that the judgment of the District Court as set forth in Assignment of Error No. I, be reversed.

Dated, Fairbanks, Alaska,
October 10, 1949.

Respectfully submitted,

ROBERT A. PARRISH,

Attorney for Appellant.

No. 12,314

IN THE
United States Court of Appeals
For the Ninth Circuit

MIKE ERCEG,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States
for the Territory of Alaska, Fourth Division.

BRIEF FOR APPELLEE.

H. G. MORISON,

Assistant Attorney General,

HARRY O. AREND,

United States Attorney,

EVERETT W. HEPP,

Assistant United States Attorney,

Attorneys for Appellee.

EDWARD H. HICKEY,

Special Assistant to the Attorney General,

JOSEPH B. McGRATH,

Attorney, Department of Justice,

Of Counsel.

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No. 12,314

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MIKE ERCEG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States
for the Territory of Alaska, Fourth Division.

BRIEF FOR APPELLEE.

STATEMENT.

Appellant sets forth a fair statement of the pleadings which give rise to the questions presented in this appeal in the first two pages of his brief, with the exception that he might have set out the statutes of limitations applicable to this claim under the laws of the Territory of Alaska. These will be set forth where pertinent in this brief, *infra*.

QUESTIONS PRESENTED.

The appellee agrees that the sole question now before this Court is whether or not the District Court for the Territory of Alaska erred in sustaining appellee's demurrer herein on the ground that this action was not commenced within the time limited by law.

I. THIS ACTION WAS NOT COMMENCED WITHIN THE TIME LIMITED BY LAW.

It is manifest, from appellant's complaint and contract attached thereto (R. 2-17), that, as advanced in the second ground of appellee's demurrer (R. 20), the statute of limitations effectively barred this action.

The sections of the Alaska Compiled Laws Annotated, 1949, pertaining to the subject of limitation of actions and applicable to the case under consideration, are as follows:

"Sec. 55-2-1. Civil actions shall only be commenced within the periods prescribed in this article after the cause of action shall have accrued, except when, in special cases, a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited shall only be taken by answer, except as otherwise provided in Section 55-5-41.

Sec. 55-2-3. Within ten years——

* * * * * *

Second. An action upon a sealed instrument.

Sec. 55-2-4. Within six years——

First. An Action upon a contract or liability, express or implied, excepting those mentioned in Section 55-2-3.

Sec. 55-5-41. The defendant may demur to the complaint within the time required by law to appear and answer, when it appears on the face thereof, either——

* * * * *

Seventh. That the action has not been commenced within the time limited by this code.”

The contract, a copy of which is attached to and made a part of the appellant's complaint and on which appellant bases this suit, appears to be an ordinary express contract signed by both the parties but not under seal (R. 5-7) In paragraphs IV and V of his complaint (R. 3 and 4), the appellant alleges that the contract was entered into by the parties on the 17th day of July, 1942, and under the terms thereof the appellant rented to the War Department of the Government (the appellee) equipment for drilling water wells at Big Delta, Alaska, at an agreed daily rental charge. He further alleges that the Government used said equipment, under the terms of said contract, from the 17th day of July 1942, to the 1st day of December 1942, and now refuses to pay the amount of rent due for the use of said equipment during the time stated.

The contract provided that the rental term was to commence “from the 17th day of July 1942, until all wells at said Big Delta, Alaska, are completed.” (R. 6.) In Paragraph V of the complaint, the appellant al-

II. APPELLANT IS ENTITLED TO NO REMEDY UNDER SECTION 13 (b) OF THE CONTRACT SETTLEMENT ACT OF 1944, SECTION 113 (b) OF TITLE 41, UNITED STATES CODE.

A close scrutiny of the Contract Settlement Act of 1944, 58 Stat. 649, Title 41, U.S.C. Sections 101-125, will show that all but three of its sections (excluding those relating only to the definitions, purposes, and administrative set-up under the Act) pertain solely to "termination claims". There is nothing in the record, and indeed appellant has no grounds whatsoever to so indicate, to show that this is a "termination claim".

The definitions in Section 3 of the Contract Settlement Act of 1944 show exactly to what type of claim the majority of the provisions of the Act apply. Section 3(h), 41 U.S.C. 103(h), reads as follows:

"(h) The term 'termination claim' means any claim or demand by a war contractor for fair compensation for the termination of any war contract and any other claim under a terminated war contract, which regulations prescribed under this Act authorize to be asserted and settled in connection with any termination settlement."

Section 3(d), 41 U.S.C. 103(d) reads:

"(d) The terms 'termination', 'terminate', and 'terminated' refer to the termination or cancellation, in whole or in part, of work under a prime contract for the convenience or at the option of the Government (except for default of the prime contractor) or of work under a subcontract for any reason except the default of the subcontractor."

No termination order as above defined ever issued here and there is no pretence in the record that one ever issued so that this might be called a "termination claim". Thus, appellant is entitled to none of the benefits of Sections 6, 7, 8, 9, 13, or 14 of the Act, 41 U.S.C. 106, 107, 108, 109, 113, 114, since he does not have a "termination claim". The Court below, therefore, would have had no jurisdiction under Section 13 of the Act, 41 U.S.C. 113, in any event and should also have sustained the first ground of appellee's demurrer which went to the jurisdiction of the subject matter. (R. 20.)

Of the three sections of the Contract Settlement Act of 1944 which have a broader scope, Sections 17, 18 and 19 (41 U.S.C. 117, 118 and 119), only Section 17 is pertinent to this action. As far as material here, that section reads as follows:

"Sec. 17. (a) Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor.

(b) Whenever any formal or technical defect or omission in any prime contract, or in any grant of authority to an officer or agent of a contracting agency who ordered any materials, services, and facilities might invalidate the contract or commitment, the contracting agency (1) shall not take

advantage of such defect or omission; (2) shall amend, confirm, or ratify such contract or commitment without consideration in order to cure such defect or omission; and (3) shall make a fair settlement of any obligation thereby created or incurred by such agency, whether expressed or implied in fact or in law, or in the nature of an implied or quasi contract.

(c) Where a contracting agency fails to settle by agreement any claim asserted under this section, the dispute shall be subject to the provisions of section 13 of this Act."

* * * * *

Just as it is obvious that appellant's claim is not a "termination claim", so it is evident that appellant cannot take advantage of Section 17, *supra*, 41 U.S.C. 117. Section 17(a) is applicable to a person "without a formal contract" only and, here, the very basis of this suit is the contract entered into by appellant and a Resident Engineer. (R. 7.) Section 17(b) is likewise inapplicable here since the United States is in no way attempting to take advantage of any defect or omission in appellant's contract. Thus, Section 17(c), which provides that disputes over the settlement of any claim under these first two subsections of Section 17 shall be subject to the provisions of Section 13 of the Act (giving such claimants the right either to appeal to the Appeal Board or to bring suit), affords appellant no relief. His claim is simply not covered by the Contract Settlement Act of 1944.

The above construction of Section 17 of the Act is supported by numerous decisions of the Appeal Board

created by Section 13(d), though apparently there has been no judicial construction as yet. The Appeal Board decisions, however, are a useful guide and should be given considerable weight since, as recently recognized by the Court of Claims, it has concurrent jurisdiction with the Court of Claims (and the district courts) over appeals from agency determinations on claims under the Act. *Piggly Wiggly Corporation v. United States*, 112 C. Cls. 391, 431 (1949).

In a case in which the Board denied a claim for the furnishing of materials on an oral order when they could have been furnished under a change order within the general scope of the changes article of the contract, the Board pointed out that (pp. 4, 6):

“At the threshold of the case, we are confronted with the objection that appellants did not install the insulation ‘without a formal contract’, within the meaning of section 17(a). If the contention has merit, appellants cannot recover.”

* * * * *

“The legislative history and language of section 17(a) evidence a broad purpose to assure fair compensation to any person who, in good faith reliance upon a Government request, arranges to furnish or furnishes war materials, services, or facilities, without a formal contract. This section does not apply to a person who renders performance pursuant to a formal contract, because, presumably, such person will receive compensation in accordance with the terms of the contract. * * *”

Brennan & Cahoon v. Navy Department, Vol. 1, Decisions of the Appeal Board, Office of Contract Settle-

ment (Govt. Printing Office 1948), decided May 8, 1946; C.C.H. Government Contracts Reporter, Par. 60,077.

In a case in which the Appeal Board denied a claim under Section 17 of the Act for work done for the Army Transportation Corps allegedly over and above a contract, the Board stated (page 4):

“Considering, first, section 17(a), we are faced, as in so many cases, with the statutory denial of our power in cases where the services were rendered ‘without a formal contract’. So long as the contract remains in this case, it constitutes an insurmountable obstacle to recovery under section 17(a). Is there any way in which this obstacle may be removed?”

Dinerstein, et al. v. War Department, Vol. 2, *op.cit. supra*, decided June 2, 1947; C.C.H. Government Contracts Reporter, Par. 60,322.

In a case in which the Appeal Board denied a claim under Section 17 of the Act for work performed under a purchase order issued by the War Shipping Administration, claimant alleging ambiguity so as to invalidate the order as a contract, the Board concluded as follows (pages 112-113):

“Since we have found that appellant furnished the materials in question under a formal contract, which was neither void nor voidable, it follows that appellant cannot successfully claim under section 17(a). That section affords relief in a proper case only to a person who proceeds without a formal contract (Cf. *Samuel Saffer’s Sons v. War Department*, App. Bd. OCS No. 71

Vol. 1, decided January 31, 1947; *H. A. Johnson Company v. Navy Department*, App. Bd. OCS No. 66, Vol. 1, decided January 31, 1947.)

“What we have said largely disposes of appellant’s claim under section 17(b). There is a valid formal contract, with no formal or technical defects or omissions. (Cf. *Samuel Saffer’s Sons v. War Department*, App. Bd. OCS No. 71, Vol. 1, decided January 31, 1947; *H. A. Johnson Company v. Navy Department*, App. Bd. OCS No. 66, Vol. 1, decided January 31, 1947.) There is no room for the application of section 17(b).

“The findings of the Maritime Commission insofar as they deny appellant’s claim are affirmed.”

Rogers-Kellogg-Stillson, Inc. v. Maritime Commission, Vol. 3, *op. cit. supra*, decided October 28, 1948; see also, *Seymour Packing Company v. Department of the Army*, Vol. 3, *op. cit. supra*, p. 140, 142, decided November 26, 1948. C.C.H. Government Contracts Reporter, Paragraphs 60,578 and 60,600.

It is clear from the above that the only jurisdiction which the District Court for the Territory of Alaska could exercise in this case is its jurisdiction to hear appellant’s contract claim against the United States as allowed and limited by the Tucker Act, 28 U.S.C. 41(20), now 1346(a)(2) and related provisions. As limited by Section 2401(a) of Title 28 United States Code, it is obvious from the complaint and attached contract that this action was not commenced within the time so limited by law.

It is equally clear that appellant cannot take advantage of the benefits and relief provisions of the Contract Settlement Act of 1944 since under that Act the jurisdiction of a District Court to hear a suit against the United States is limited to suits arising from "termination claims" or claims based upon the furnishing of materials, services or facilities by a person *without a formal contract* or one in which the contracting agency is attempting to take advantage of a technical defect or omission. Appellant comes within neither of these alternatives.

Appellant may well be a "war contractor" under the Act and may well have had a "prime contract" or "war contract" as defined therein, but the only applicability of the Act, if this is so, is to subject him to the provisions of the Act inserted for the protection of the Government and relating to the maintenance of records, investigations, liability for submitting fraudulent claims, etc. Since there is no termination claim involved in the case, nor any enforceable claim under Section 17 of the Act, appellant cannot take advantage of the Act to avoid the statutes of limitations barring this suit.

CONCLUSION.

For the foregoing reasons, therefore, it is respectfully submitted that the judgment of the District Court for the Territory of Alaska sustaining the second ground of appellee's demurrer in this case should be affirmed.

Dated, December 7, 1949.

H. G. MORISON,

Assistant Attorney General,

HARRY O. AREND,

United States Attorney,

EVERETT W. HEPP,

Assistant United States Attorney,

Attorneys for Appellee.

EDWARD H. HICKEY,

Special Assistant to the Attorney General,

JOSEPH B. McGRATH,

Attorney, Department of Justice,

Of Counsel.

No. 12,314

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UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT.

ROBERT A. PARRISH,

224-226 Lavery Building, Fairbanks, Alaska,

Attorney for Appellant.

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PAUL P. O'BRIEN,

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No. 12,314

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MIKE ERCEG,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT.

STATEMENT.

The Appellant in this case filed his complaint on the 21st day of April, 1949, within 90 days after the Defendant Contracting Agency denied his claim.

(a) The Plaintiff agrees that the Statute of Limitations of the Territory of Alaska would bar any claim of the Plaintiff, if the Statute were applicable.

(b) It is agreed that, if this action were brought under the provisions of the Tucker Act, the action would likewise be barred, if the Tucker Act were applicable.

(c) The action however, is filed under the Contract Settlement Act of 1944, Title 41, Chapter

2, and in accordance with the provisions of Section 113c, within 90 days after the Administrative denial of the Contracting Agency, of Plaintiff's claim.

(d) Defendant seems to admit Plaintiff is the holder of a war contract.

(e) Defendant seems to admit Plaintiff is a war contractor.

(f) Defendant seems to admit that Defendant is a Contracting Agency with authority to enter into a war contract.

(g) Defendant contends that the Contract Settlement Act of 1944 is not applicable to Plaintiff and that this suit could only be brought under the Tucker Act, upon which the Statute of Limitations has run.

(h) Defendant contends that Plaintiff's claim is not a termination claim as defined under Title 41, U.S.C., Section 103h and Section 103d, and in fact, does not come under any of the Sections of Title 41, Chapter 2.

(i) Defendant further contends that under the provisions of Title 41, Chapter 2, Sections 117 and 118, that since Plaintiff is the holder of a formal contract, he could not come under any of the Sections just cited, so as to bring his claim within the Act.

QUESTIONS INVOLVED.

The applicability of the Contract Settlement Act of 1944 to this Action.

I. THE PLAINTIFF'S CLAIM IS ONE COGNIZABLE UNDER THE CONTRACT SETTLEMENT ACT OF 1944 AND HIS ACTION IS THEREBY BROUGHT WITHIN THE TIME REQUIRED BY LAW.

The Contract on which the Plaintiff relies is one of a lease for an indefinite term to be terminated at the option of the Defendant, when the Defendant has done such work as was necessary in drilling wells upon its Air Base at an agreed daily or monthly rental. And, it further appears from the complaint of the Plaintiff that the Government did use the equipment until the first day of December, 1942 when it, at its option, terminated the Contract.

The purpose of the Contract Settlement Act of 1944 as set out in Title 41, Section 101, U. S. C. Annotated, is to assure prime contractors, sub-contractors, small and large, speedy and equitable settlement of claims under *terminated war contracts* and adequate interim financing, until such settlement. The term, termination claim, means any claim or demand by a war contractor for *fair compensation* for the termination of any war contract and *any other claim under a terminated war contract*, which regulations prescribed under this Act authorize to be asserted and settled in connection with any termination settlement. (Title 41, U. S. C. 103h, Section 3h.) (Italics ours.)

For these reasons Appellant has a valid termination claim and has placed himself within the provisions of the Contract Settlement Act of 1944.

Dated, Fairbanks, Alaska,
January 6, 1950.

ROBERT A. PARRISH,
Attorney for Appellant.

No. 12315

United States
Court of Appeals
For the Ninth Circuit.

P. M. BARGER LUMBER CO., a Corporation,
Doing Business Under the Name and Style of
Barger Millwork Company,

Appellant,

vs.

J. L. WHITEHOUSE and INTERSTATE LUM-
BER SALES, INC.,

Appellees.

Transcript of Record

Appeal from the United States District Court,
for the District of Oregon.

FILED
DEC 8 1949
PAUL P. O'BRIEN,
CLERK

No. 12315

United States
Court of Appeals
For the Ninth Circuit.

P. M. BARGER LUMBER CO., a Corporation,
Doing Business Under the Name and Style of
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Appellant,

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

W. J. PRENDERGAST, JR.,
LEO LEVENSON,

Spalding Building,
Portland, Oregon
For Appellant.

OTTO F. VONDERHEIT,
STANLEY R. DARLING,

841 Willamette Street,
Eugene, Oregon
For Appellees.

In the District Court of the United States
for the District of Oregon
Civil No. 4320

P. M. BARGER LUMBER CO., a corporation doing business under the name and style of BARGER MILLWORK COMPANY,
Plaintiff,

vs.

AUSTIN DODDS and J. L. WHITEHOUSE, co-partners doing business under the assumed name and style of Austin Dodds Company; J. L. WHITEHOUSE, an individual doing business under the assumed name and style of Interstate Lumber Sales, and INTERSTATE LUMBER SALES, INC., an Oregon corporation,
Defendants.

PRE-TRIAL ORDER
Preliminary Statement as to
Nature of Action

Plaintiff brings this action to recover damages for a breach of express warranty of kind and quality of a carload of doors purchased on or about January 10, 1948.

General Resume of Facts Admitted by the Parties Hereto and Which Do Not Require Any Proof
It is admitted:

(1) That plaintiff, P. M. Barger Lumber Co., is a corporation existing under and by virtue of the laws of the State of North Carolina, and doing

business under the name and style of Barger Millwork Company, and as such is a citizen of the State of North Carolina.

(2) That the defendant, J. L. Whitehouse, is a citizen of the State of Oregon, and was doing business as Interstate Lumber Sales; that the defendant, Interstate Lumber Sales, Inc., is a corporation existing under and by virtue of the laws of the state of Oregon, since April 1, 1948.

(3) That at all times herein the plaintiff was engaged in the wholesale warehousing and selling of lumber and millwork, with its principal place of business in the City of Stateville, State of North Carolina.

(4) That the defendant, J. L. Whitehouse, was engaged as an individual in the wholesale lumber business in the State of Oregon, under the name and style of Interstate Lumber Sales; that the defendant, Interstate Lumber Sales, Inc., as a corporation, was engaged in the wholesale lumber business at all times herein mentioned after April 1, 1948.

(5) It is admitted a diversity of citizenship exists between the plaintiff and defendants, and that the matter in controversy exceeds \$3000.00, exclusive of interest and costs.

(6) That this action may be dismissed as to defendant, Austin Dodds.

Contentions of Plaintiff

(1) Plaintiff contends that on or about January 10, 1948, defendant agreed to sell and plaintiff agreed to purchase a carload, or 1500, fir wood doors

of a standard design known as F82, and of grade "A," which design and grade defendant warranted.

(2) That plaintiff paid the defendant, in advance, for said carload of doors, the sum of \$11,709.60, plus bank charges of \$12.60, and plaintiff also paid freight charges in the sum of \$918.90, plaintiff's demand for refund.

(3) That defendant shipped to plaintiff a carload of doors that were not as represented and warranted, and plaintiff within a reasonable time notified the defendants of its refusal to accept said doors and offered to return the same in substantially as good a condition as when received, and requested instructions as to disposition of the doors, and requested the refund of the purchase price, the bank charges and the freight. That the defendant advised the plaintiff to hold doors, attempt to find a market for the doors and promised to refund to the plaintiff.

(4) That plaintiff was obliged to warehouse said doors and pay additional cartage thereon in the reasonable sum of \$500.00, special damages.

(5) That the plaintiff informed the defendant, and the defendant knew, that said doors had been sold by the plaintiff for profit; that the plaintiff suffered a loss of \$1200.00 profit as special damages.

(6) That plaintiff contends that by reason of its said notice to defendant it elected to rescind the sale.

(7) Plaintiff contends that said doors were purchased from defendant through one Ruth Meyer, a lumber broker.

Defendant Whitehouse Contends:

(1) That he did not sell the doors to the plaintiff and that no contractual relationship existed at any time between him and plaintiff.

(2) In the event the Court determines that Ruth Meyer was an agent of the plaintiff and that a direct contractual relationship did exist between plaintiff and Whitehouse of which the plaintiff is entitled to take advantage, the defendant Whitehouse contends:

(a) That the plaintiff waived any right to rescind by failing to notify the defendant Whitehouse of the decision to rescind within a reasonable time after delivery to the plaintiff, and failed to return or offer to return the doors to the defendant Whitehouse in substantially as good condition as they were in at the time the property was transferred to the plaintiff.

(b) That the plaintiff further waived and lost any right to rescission by exercising acts of dominion and ownership over the doors at a time and after the plaintiff knew of the alleged defects in the doors upon which the plaintiff bases its position that there was a breach of warranty; said acts of dominion were the sale of a portion of said doors; the retention of the doors; efforts on its behalf to sell the doors; presenting of a claim for damages in transit against the railroad carrier; demand upon Ruth Meyer for an adjustment in price; offering to settle its claim for adjustment of price on basis of whatever Ruth Meyer and defendant, Whitehouse, could work out, and specifically offering to

settle its claim for an adjustment in price at 40c per door.

(c) That the plaintiff offered to settle its claim for an adjustment on the price of the doors for 40c per door and the defendant Whitehouse accepted said offer and sent a check in the amount of \$615.00, representing slightly in excess of 40c per door.

(d) That the defendant Whitehouse, acting through his agent, the defendant Interstate Lumber Sales, Inc., on or about September 23, 1948, sent a check in the amount of \$615.00 to the plaintiff in full satisfaction of the plaintiff's disputed and unliquidated claim for damages against the defendant Whitehouse, arising out of the sale of said doors; that the plaintiff retained said check and still retains said check and that by accepting and retaining said check on said condition entered into an accord and satisfaction with defendant Whitehouse and accepted said check in full payment and satisfaction of any obligation of the defendant, Whitehouse, under plaintiff's claim.

(e) That by the custom and usage existing in the lumber trade, including trade in fir doors, the plaintiff, as a buyer, was required to make any complaint involving the quality of the doors in question within five days from the receipt of the doors by the plaintiff.

(f) That plaintiff is estopped by his silence and acts of dominion over the doors to deny ownership of the doors and to deny that he accepted defendant Whitehouse's offer of June 25, 1948, to

settle plaintiff's claim on basis of \$615.00 from Whitehouse and \$300.00 from Ruth Meyer.

(g) "That the plaintiff did not offer and was unable to restore and still is unable to restore the defendant to his status quo existing prior to the delivery of the doors to the plaintiff."

(3) That the plaintiff is estopped to claim Ruth Meyer as an agent in the transaction with the defendant Whitehouse for the reason that the plaintiff held out and represented to the said defendant that Ruth Meyer was an independent dealer in wholesale lumber, both before and after the date of the alleged claim by the plaintiff.

(4) By the custom and usage existing in the trade of wholesale lumber dealers and including, but not limited to dealers in fir doors, the transaction between the defendant Whitehouse and Ruth Meyer with respect to the doors in question was a completed sale and no contractual relationship was entered into by said defendant with the plaintiff.

(5) That the relationship existing between Plaintiff and Ruth Meyer, a wholesale lumber dealer, and between Plaintiff and defendant, and defendant and Ruth Meyer were established and determined by the usage and custom of the lumber trade including the buying and selling of fir doors. The Plaintiff contends that the relationship was that Meyer was his agent. If the Plaintiff is correct then the defendant is a subagent and only relationship of Seller-Buyer is between Grant Manufacturing Co., the manufacturer and shipper of the doors.

The Contentions of the Defendant Interstate
Lumber Sales, Inc., Are:

(1) That it never had any contractual relationship with plaintiff except in the capacity of an agent for defendant Whitehouse as contended by said defendant.

(2) That it never assumed any liability which might exist on the part of defendant Whitehouse to the plaintiff.

QUESTIONS OF LAW

(1) Was there a breach of an express warranty by the defendants as vendors to the plaintiff as buyer?

(2) Was there a rescission by plaintiff?

(3) Was Ruth Meyer an agent for plaintiff?

(4) If she was an agent was her agency limited to purchase of the doors, or did agency extend to the handling of settlement of the claim by the plaintiff?

(5) Was there an accord and satisfaction?

(6) Was plaintiff estopped to claim Ruth Meyer was its agent?

(7) Was plaintiff estopped to deny ownership of doors and to deny that it accepted defendant Whitehouse's offer of settlement by plaintiff's conduct after June 25, 1948?

Pre-Trial Exhibits Offered by the
Respective Parties

The following exhibits were offered and received at pre-trial conference and it was stipulated by and between the parties through their respective

counsel, except for the exhibits hereinafter specifically designated, that the same can be admitted in evidence at the time of trial without further identification or authentication and without objection save and except as to their competency, materiality or relevancy, to wit: (The defendants reserve objections on authenticity, identification, competency, and relevancy to the following numbered plaintiff's exhibits: 5; 9; 11; 12; 14; and 15.)

Pre-Trial Exhibits Offered
By the Respective Parties

Offered by Plaintiff:

- Ex. 1. Letter, McLaughlin, dated 3/9/48.
- Ex. 2. Order of acceptance, J. C. Hendricksen.
- Ex. 3. Order, for 582 doors, Ruth Meyer, 1/12/48.
- Ex. 4. Letter, Interstate to Barger, 6/25/48.
- Ex. 5. Letter, McLaughlin to Interstate, 5/17/48.
- Ex. 6. Telegram, Meyer to Barger.
- Ex. 7. Notice of Sight Draft, #6561, 1/19/48.
- Ex. 8. Sight Draft, Bank of California—Barger, No. 6561, 1/19/48.
- Ex. 9. Picture of doors.
- Ex. 10. Brochure, Fir Door Institute.
- Ex. 11. Letter, Meyer to Barger, 1/31/48.
- Ex. 12. Letter, Meyer to Barger, 2/13/48.
- Ex. 13. Copy Letter, Meyer to Hendricksen, 2/24/48 (Def. E.)
- Ex. 14. Letter, Barger to Meyer, 2/14/48.
- Ex. 15. Letter, Meyer to Barger, 3/5/48.

Ex. 16. Meyer to Dodds, 3/5/48 (Def. D.)

Offered by Defendants:

Ex. A Letter, Interstate to Barger, 9/23/48.

Ex. B Letter, Barger to McLaughlin, 9/13/48.

Ex. C Letter, Barger to McLaughlin, 3/13/48.

Ex. D Letter, Meyer to Dodds, 3/15/48 (Pl.
#16)

Ex. E Letter, Meyer to Hendricksen, 2/24/48.

Ex. F Letter, Meyer to Hendricksen, 2/7/48.

Ex. G Letter, Hendricksen to Meyer, 2/5/48 (last
paragraph)

Ex. H Letter, Meyer to Dodds, 1/31/48.

Ex. I Check #312, Interstate to Barger, \$615.00,
6/25/48.

Ex. J Telegram, pencil copy, Barger to Meyer,
2/4/48.

Ex. K Sight draft, Copy, First Nat'l, Eugene
#12225, 1/15/48.

Ex. L Pamphlet, Standards, fir doors, #CS73-45.

Ex. M Letter, Barger to Meyer, 3/2/48.

Ex. N Letter, Meyer to Barger, 3/25/48.

Ex. O Letter, Barger to Meyer, 3/30/48.

Based upon the hearing before this Court, the plaintiff appearing by its attorneys, W. J. Prendergast, Jr. and Leo Levenson, the defendants J. L. Whitehouse and Interstate Lumber Sales, Inc. appearing by their attorneys, Otto F. Vonderheit and Stanley R. Darling, and defendant Austin Dodds appearing by his attorneys, Harris, Bryson, Riddlesbarger and Butler, by Ed Butler.

It Is Ordered that the foregoing constitute the

pre-trial order in the above entitled cause and that the foregoing order supersedes the pleadings and said pre-trial order shall not be amended during the trial except by consent or by order of the Court to prevent manifest injustice.

Dated this 5th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

Approved as to form:

/s/ W. J. PRENDERGAST, JR.,
Of Attys. for Plaintiff.

/s/ STANLEY R. DARLING,
Of Attys. for Defendants.

[Endorsed]: Filed May 5, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

If Barger has a claim it would be against the estate of Meyer, and under our practice the estate could implead Dodds, et al.

However, I add that I feel plaintiff's course of conduct is inconsistent with rescission. See for example the letter of Barger to Meyer 3/30/48, next to the last paragraph.

Dated May 25, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 25, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This Cause came on for pre-trial hearing and conference on the 2nd day of May, 1949; the plaintiff appeared by its attorneys, W. J. Prendergast, Jr. and Leo Levenson, Spalding Building, Portland, Oregon; the defendant, Austin Dodds, appeared by his attorneys, Harris, Bryson, Riddlesbarger and Butler, represented by E. A. Butler; the defendants, J. L. Whitehouse and Interstate Lumber Sales, Inc. appeared by their attorneys, Darling & Vonderheit, represented by Otto F. Vonderheit and Stanley R. Darling, 841 Willamette Street, Eugene, Oregon; the parties stipulated in open court that the defendant, Austin Dodds, had no interest in the cause and the Court ordered the dismissal of the defendant, Austin Dodds; the Court then set the cause for trial at 10 a.m., Thursday, May 5, 1949;

This Cause came on for trial before the Court without a jury at 10 a.m., Thursday, May 5, 1949; the parties stated that a pre-trial order had been agreed upon and the pre-trial order was entered and the various exhibits by the respective parties were numbered and admitted subject to any specific objection which either party might desire to make during the course of the trial;

The trial proceeded and the Court heard evidence on behalf of each of the parties and also heard oral arguments by the attorneys for each of the parties; following the arguments the Court indicated that

each of the parties could file points and authorities and thereafter each of the parties through his attorneys filed points and authorities with the Court;

At this time, the Court, having considered all matters at issue in the above cause between the plaintiff and the defendant, J. L. Whitehouse and Interstate Lumber Sales, Inc., an Oregon corporation, said parties being the only parties remaining in the controversy, and being fully advised in the premises, makes the following:

Findings of Fact

I.

That plaintiff, P. M. Barger Lumber Co., is a corporation existing under and by virtue of the laws of the State of North Carolina, and doing business under the name and style of Barger Millwork Company, and as such is a citizen of the State of North Carolina;

II.

That the defendant, J. L. Whitehouse, is a citizen of the State of Oregon; that the defendant, Interstate Lumber Sales, Inc., is a corporation existing under and by virtue of the laws of the State of Oregon, since April 1, 1948;

III.

That at all times herein the plaintiff was engaged in the wholesale warehousing and selling of lumber and millwork, with its principal place of business in the City of Statesville, State of North Carolina;

IV.

That the defendant, J. L. Whitehouse, was en-

gaged as an individual in the wholesale lumber business in the State of Oregon under the name and style of Interstate Lumber Sales during the time of this controversy; that the defendant, Interstate Lumber Sales, Inc., as a corporation, was engaged in the wholesale lumber business at all times during the controversy after April 1, 1948;

V.

That a diversity of citizenship exists between the plaintiff and defendants, and that the matter in controversy exceeds Three Thousand Dollars (\$3,000.00), exclusive of interest and costs;

VI.

That on January 10, 1948, the defendant, J. L. Whitehouse, agreed to sell to Ruth Meyer, a wholesale lumber dealer in Portland, Oregon, a carload (1500 in number) of F82 fir wood doors; that under orders from Ruth Meyer, the defendant, J. L. Whitehouse, was to ship said doors to the plaintiff in Statesville, North Carolina; that this transaction was instituted and completed on the basis of a telephonic order by Ruth Meyer to an employee of the defendant, J. L. Whitehouse, in Portland, Oregon, and the doors were en route from a California manufacturer to the directed destination on January 13, 1948;

VII.

That the doors were purchased from the defendant, J. L. Whitehouse, by Ruth Meyer in her capacity as an independent wholesale lumber dealer and not as an agent of the plaintiff;

Conclusions of Law

I.

That the Court has jurisdiction of this controversy;

II.

That neither the defendant, J. L. Whitehouse, nor the defendant, Interstate Lumber Sales, Inc., an Oregon corporation, sold any doors to the plaintiff; that the only sale of doors which was made was made by the defendant, J. L. Whitehouse, to Ruth Meyer and that said sale did not constitute a sale of the doors in question to the plaintiff either directly or as an undisclosed principal of Ruth Meyer, by either the defendant, J. L. Whitehouse, or the defendant, Interstate Lumber Sales, Inc., that under the customs and usages of the wholesale lumber trade in the Pacific Northwest trade area, including the sale and purchase of fir doors, the purchase of the doors by Ruth Meyer from J. L. Whitehouse was a separate independent transaction complete in itself; that no contractual relationship of Seller and Buyer or other contractual relationship existed at any time between the defendant, J. L. Whitehouse, and the plaintiff with reference to the doors in question; and that no contractual relationship of Seller and Buyer or other contractual relationship existed at any time between the defendant, Interstate Lumber Sales, Inc., an Oregon corporation, and the plaintiff with reference to the doors in question;

III.

That the plaintiff has failed to prove any claim for breach of warranty in the nature of rescission or otherwise against either of the defendants, J. L. Whitehouse, or Interstate Lumber Sales, Inc.; that if the plaintiff has a claim based upon the facts alleged in its complaint and under the provisions of the pre-trial order, then said claim is against Ruth Meyer or against the estate of Ruth Meyer;

IV.

That each of the defendants, J. L. Whitehouse and Interstate Lumber Sales, Inc., are entitled to a judgment in bar against the plaintiff and to their costs and disbursements herein;

Dated at Portland, Oregon, this 16th day of June, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed June 16, 1949.

In the District Court of the United States
For the District of Oregon
Civil No. 4320

P. M. BARGER LUMBER CO., a corporation doing business under the name and style of BARGER MILLWORK COMPANY,
Plaintiff,

vs.

AUSTIN DODDS and J. L. WHITEHOUSE, co-partners doing business under the assumed

name and style of Austin Dodds Company; J. L. WHITEHOUSE, an individual doing business under the assumed name and style of Interstate Lumber Sales, and INTERSTATE LUMBER SALES, INC., an Oregon corporation,

Defendants.

JUDGMENT

This Cause having come on regularly for trial before the Court sitting without a jury on the 5th day of May, 1949, the plaintiff appearing by its attorneys, W. J. Prendergast and Leo Levenson, Spalding Building, Portland, Oregon, the defendants, J. L. Whitehouse and Interstate Lumber Sales, Inc., appearing by their attorneys, Darling & Vonderheit, 841 Willamette Street, Eugene, Oregon, and this case theretofore having been dismissed as to the defendant, Austin Dodds; and the Court having heard the testimony concerning the issues between the plaintiff and the defendants and being fully advised in the premises, and the Court heretofore having filed herein its Findings of Fact and Conclusions of Law;

Now, Therefore, it is Ordered and Adjudged: (1) that the plaintiff take nothing by its action; (2) that a judgment in bar against the plaintiff and in favor of each of the defendants, J. L. Whitehouse, an individual, and Interstate Lumber Sales, Inc., an Oregon corporation, be and the same hereby is made and entered; and (3) that each of the defendants, J. L. Whitehouse, an individual, and In-

terstate Lumber Sales, Inc., an Oregon corporation take and receive judgment against the plaintiff for costs and disbursements herein.

Dated at Portland, Oregon, this 16th day of June, 1949.

/s/ CLAUDE McCOLLOCH,

District Judge.

[Endorsed]: Filed July 25, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To J. L. Whitehouse and to Interstate Lumber Sales, Inc., and to Otto F. Vonderheit and Stanley R. Darling, your attorneys:

You, and each of you, are hereby given notice that plaintiff P. M. Barger Lumber Company, a corporation, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment in favor of the defendants in the above entitled action entered on the 16th day of June, 1949.

Dated at Portland, Oregon, this 11th day of July, 1949.

/s/ W. J. PRENDERGAST, JR.,

/s/ LEO LEVENSON,

Attorneys for Appellants.

[Endorsed]: Filed July 11, 1949.

United States District Court
District of Oregon
No. Civ. 4320

P. M. BARGER LUMBER CO., a corporation
doing business under the name and style of
BARGER MILLWORK COMPANY,
Plaintiff,

vs.

AUSTIN DODDS and J. L. WHITEHOUSE, co-
partners doing business under the assumed
name and style of Austin Dodds Company; J.
L. WHITEHOUSE, an individual doing busi-
ness under the assumed name and style of
Interstate Lumber Sales, and INTERSTATE
LUMBER SALES, INC., an Oregon corpora-
tion,

Defendants.

Before: Honorable Claude McColloch,
Judge.

Appearances:

W. J. PRENDERGAST, JR.,
LEO LEVENSON,
of Attorneys for Plaintiff;

OTTO F. VONDERHEIT,
STANLEY R. DARLING,

Of Attorneys for Defendants J. L. Whitehouse
and Interstate Lumber Sales, Inc.

PROCEEDINGS

The Court: Call your witnesses.

Mr. Prendergast: Mr. Barger. .

CECIL BARGER

was thereupon produced as a witness in behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Prendergast:

Q. Will you please state your name to the Court.

A. Cecil Barger.

Q. And where is your residence, Mr. Barger?

A. Statesville, North Carolina.

Q. What is your occupation or business?

A. I am a member of the firm of P. M. Barger Lumber Company and Manager of the Barger Millwork Company, a branch of that corporation.

Q. P. M. Barger Lumber Company is a North Carolina corporation? A. Yes.

Q. And I believe that has been agreed by the parties, the corporate status in the State of North Carolina. [2*] A. Yes.

Q. And what is the Barger Millwork Company; is that a subsidiary?

A. That acts as a subsidiary of the main corporation and deals in millwork items instead of the usual lumber items.

Q. Are you an officer of the P. M. Barger Lumber Company, the corporation? A. Yes.

* Page numbering appearing at top of page of Reporter's original Transcript of Record.

(Testimony of Cecil Barger.)

Q. And I believe you testified you were the Manager of the Barger Millwork, a subsidiary of the P. M. Barger Lumber Company.

A. That is right.

Q. And as such are you in active connection with the millwork division of the company?

A. Yes, altogether.

Q. How long has the P. M. Barger Lumber Company been engaged in business, Mr. Barger?

A. I think since about 1922.

Q. And the name P. M. Barger has reference to whom?

A. My father, who is still active in the firm.

Q. And that lumber company division is still active in North Carolina in the lumber business?

A. Yes.

Q. How long has the Barger Millwork Company been in operation?

A. Since about 1937, approximately eleven years.

Q. And how long have you been active in the management of the Barger Millwork division? [3]

A. Since its organization.

Q. And are you the General Manager and operate that particular branch of the business?

A. Yes.

Q. And where is its main place of business, Mr. Barger?

A. In Statesville.

Q. How large a city is Statesville?

A. Approximately 20,000.

Q. And in what part of North Carolina is it located?

(Testimony of Cecil Barger.)

A. A little to the western part of the state, about centrally north and south.

Q. In reference to Fayetteville, North Carolina, how far is Statesville from Fayetteville?

A. I would say 175, between 150 and 175 miles.

Q. That is served by what railroads?

A. Atlantic Coast Line, among others.

Q. Mr. Barger, would you tell the Court something briefly about the business of the Barger Millwork Company; what do they do?

A. Well, our work is to buy millwork items, principally fir doors which we buy in this part of the country from established door manufacturers in carload quantities, and then we ship them into our warehouse where we generally warehouse them for redistribution on a smaller scale, anywhere from one door to a truck load to retail lumber dealers through North Carolina. [4]

Q. Would you classify the Barger Millwork Company as a wholesale business? A. Yes.

Q. In millwork? A. Yes.

Q. And since the inception of the Barger Millwork Division of the P. M. Barger Lumber Company has it engaged in such type of business?

A. Altogether.

Q. Are you familiar with all of the details and ramifications of the millwork business?

A. Yes.

Q. And with the procedures and practices and usages of that particular trade and wholesaling millwork? A. Yes.

(Testimony of Cecil Barger.)

Q. And that has come about by your experience in managing this company since its inception?

A. Yes.

Q. Now, Mr. Barger, do you know one Ruth Meyer?

A. Yes.

Q. Or, did you know Ruth Meyer?

A. Yes.

Q. How did you happen to know Ruth Meyer; what was your connection, if any, with Ruth Meyer?

A. On various occasions she offered me carloads of doors or [5] other merchandise that we normally handle.

Q. Would you speak up a little bit, please, because I am sure Counsel is not hearing.

A. I say, from time to time she offered us carloads of doors or other commodities that we normally handle, and we bought quite a few of those through her.

Q. Now, do you know what her business was?

A. She was a broker of lumber, primarily.

Q. And do you know where her business was located?

A. At that time in the Davis Building.

Q. That is in Portland, Oregon?

A. Yes.

Q. Have you ever had occasion during the time that Ruth Meyer was in business to visit her office?

A. Yes, I have been there.

Q. And would you describe generally what her business consisted of?

(Testimony of Cecil Barger.)

A. Well, of course, just the office in the building and a desk and a telephone.

Q. Did she have any yard that you know of or any stock of merchandise or inventory?

A. No; no, sir.

Q. From your observations she was purely a broker, doing business as a broker, with an office and telephone; is that correct?

A. Yes, that is correct. [6]

Q. Do you know the Austin Dodds Company?

A. No, I don't. Know them by—

Q. Did you have any business prior to January of 1948 with the Austin Dodds Company?

A. Well, I have never had any direct with them.

Q. But, I mean, did you have business through Ruth Meyer with the Austin Dodds Company?

A. I think she shipped us one car of material, one car of doors that came through them prior to that date.

Q. Prior to this particular car?

A. Just prior.

Q. That is in controversy?

A. The car that we got just prior to that came through them.

Q. Now, would you explain with reference to this particular car and that car that you are now speaking of how you did business; that is, with Ruth Meyer, what occurred?

A. Well, she called me, knowing from past experience the items that I was interested in, she

(Testimony of Cecil Barger.)

called me and stated she had a car of the F-82 doors that we were buying at that time and offered it, gave me the price and the specifications on the car, and I subsequently instructed her to buy it for us.

Mr. Prendergast: May I have this exhibit marked in order that it may be handed to the witness. This is marked on the pre-trial order, your Honor, as Plaintiff's Exhibit No. 10.

(Booklet entitled "Douglas Fir Doors, Standard [7] Designs and Specifications Adopted by the Fir Door Institute," so produced, was thereupon marked for identification Plaintiff's Exhibit No. 10.)

Q. (By Mr. Prendergast): Mr. Barger, you now have a brochure or booklet which has been marked as Plaintiff's Exhibit 10 for Identification. Would you refer to this particular booklet that you now have in your hands with particular reference to specifications, details, and a picture of the door that you have just described as F-82.

A. Yes. On Page 37 they list the specifications for their standard, which is F-82, for a two-panel door.

The Court: What booklet is it?

A. A booklet issued by the Fir Door Institute for purposes of establishing standards in their industry.

Q. (By Mr. Prendergast): Have there been standards set for fir doors?

A. Yes, the fir door manufacturers have set up

(Testimony of Cecil Barger.)

this institute for the purpose of creating standards for both design and grade.

Q. And is this a generally accepted standard in the millwork business?

A. It is for the purchase and handling of fir doors altogether, is the only existing standard.

Q. And you know of no other standards that have been set up or published? [8]

A. Not on fir doors.

Q. Now, so far as you know, as you testified, these standards have been put forth by the manufacturers or certain manufacturers of fir doors and is accepted by the millwork trade generally as the only standard?

A. That is correct.

Q. So that in purchase or sale of fir doors in the wholesale millwork business is reference made to these particular standards by number or name or grade?

A. Yes. For the sake of clarity in ordering doors from a mill we would always specify them by this "F" number, the "F" standing for "Fir" and indicating the "F" number, and we always use their numbers to avoid confusion.

Q. Then F-82 refers to a fir door. Now, what is a Fir-82 door with reference to their standards?

A. It is a two-panel door and the stiles, the vertical members, are a certain width, and the lock rail is located a certain distance from the top and bottom, and the top and bottom rails are certain widths, and it contains panels of a specified type.

(Testimony of Cecil Barger.)

Q. What is the necessity in the millwork trade or business of standards on doors?

A. Well, for the sake of simplicity in dealing with them. Of course, we are set up to handle standard merchandise; that is, merchandise that has standards which have been set up, and the dealers, the retail dealers in millwork items in purchasing from [9] us know that regardless of what mill might ship or manufacture the merchandise they purchase from us it will always match that of any other mill due to this setting up of standards. It simplifies their stocking of this merchandise.

The Court: How much business did you do in doors?

A. Well, it represents about 75 per cent of our volume, which would be probably \$125,000 or \$150,000 a year.

The Court: How wide a territory do you cover?

A. We cover the bulk of North Carolina and the northern part of South Carolina and the southern part of Virginia.

The Court: How many accounts do you have?

A. 100 to 150.

The Court: And how long have you been in that business? A. Approximately nine years.

The Court: And how long have you been in the door business?

A. Approximately nine years.

Q. (By Mr. Prendergast): Then, as I understand it, just to see where we left off here, in the

(Testimony of Cecil Barger.)

sale of these doors you order and sell by a number or specification taken from these particular standards, is that correct?

A. That is correct, in order that the merchandise that any dealer gets from any wholesaler will always match other merchandise in his stock. Otherwise when the material were finally used in a home, if he were unable to fill an order for a particular house in a matching door, regardless of size, naturally it [10] would be very unfortunate.

Q. Do you know if architects make any particular reference to these standards and design and specifications for building, Mr. Barger?

A. They do where stock merchandise is to be used, and generally the stock merchandise for the same item—I mean for similar items such as a door of a given size would be considerably cheaper in price in a stock door than in a specially detailed door, as can readily be seen. They are manufactured on a production-line basis to the standard specifications; and, therefore, to effect economy, let's say a home, why, the architect might specify to a given standard and know exactly what he was going to get.

Q. Now, in reference to standard design, would you say that this particular, these particular standards contained in this exhibit offered for identification, are the only standards existing in the millwork business that you know that has reference to fir doors?

A. Yes, that is correct.

(Testimony of Cecil Barger.)

Q. Now, in regard to grade, does that particular exhibit now being offered have any reference to grade, Mr. Barger?

A. Yes, it gives the grades as set up by the Institute, and they have been entered as a commercial standard by the Government and generally accepted by the millwork trade.

Q. What grades are described in this particular brochure? [11]

A. They describe A grade, B grade and C grade, and one known as mill-run.

Q. And are these grades as contained in this particular exhibit generally accepted in the trade and the millwork business as being the definition and description of the grades of fir doors?

A. Oh, yes.

Q. So any reference by anyone dealing in purchasing or sale of fir doors, having a door described as A grade, B grade, C grade or mill-run, would have reference to the grades contained in this particular exhibit?

A. They would refer to this grade only, yes.

Q. Do you know of any other grade generally accepted for fir doors in the trade other than the Fir Door Institute grade?

A. No.

The Court: How long has this standard existed; for the entire nine years?

A. Oh, yes, that long and much longer.

Mr. Prendergast: If the Court please, at this time the plaintiff would like to offer Plaintiff's Exhibit 10 for Identification, this particular volume.

(Testimony of Cecil Barger.)

Mr. Darling: As I understand it, you are offering it in evidence?

Mr. Prendergast: Offering it in evidence.

Mr. Darling: No objection.

The Court: Admitted. [12]

(Plaintiff's Exhibit No. 10, previously marked for Identification, was thereupon received in evidence.)

Q. (By Mr. Prendergast): Now, with reference to this F-82—and would you turn to this Exhibit 10 that you now hold—I note that you have testified that that is F-82, that it is described as a two-panel fir door; is that correct? A. Yes.

Q. Are there other two-panel fir doors with other descriptions, Mr. Barger?

A. I don't recall any—Yes, here is one described as F-28 and F-29, depending upon the width of the stile as to which it is. It is an entirely different make-up; I mean the location of the panels are entirely different.

Q. Now, when you speak of “stile” do you mean the stile of the door as a technical term or——

A. Well, stiles, (spelling) s-t-i-l-e-s, is the vertical outside members of the door.

Q. Now, what is there in the design of a F-82 two-panel door that differentiates it from any other two-panel door?

A. Well, it would have to do primarily with the location of the lock rail, which, of course, makes it a two-panel door due to the division of this panel,

(Testimony of Cecil Barger.)

and the width of that rail. Those would be the primary changes in determining a two-panel door; the location and size of the lock rail would be the main things [13] that might be changed.

The Court: Put your finger on that rail you are talking about.

A. This is the F-82 door, and this is a lock rail (indicating).

The Court: What is that first word?

A. Lock, (Spelling) l-o-c-k. It is there for strengthening of the doors.

The Court: Are those panels plywood?

A. They are plywood, three-ply panels.

Q. (By Mr. Prendergast): Now, lock rails—this lock rail, in construction are there two panels of plywood or one panel of plywood with the part that is known as the lock rail applied to it? Do I make myself clear?

A. The standard position, of course, is to have two panels, separate panels. The lock rail is full inch and three-eighths or three-quarters of the door and is grooved as the other members to receive these panels; so the lock rail is a single piece, let's put it that way.

Q. A single piece that runs right through the door? A. Yes.

The Court: How are these people in California making fir doors? Is this our Northwest fir you are talking about?

A. Yes. I have never known of a California source before.

(Testimony of Cecil Barger.)

The Court: Was that fir?

A. The bulk is fir. There are a few pine. [14]

Mr. Prendergast: I think we will clear that up a little later, your Honor, with particular reference to that.

Q. Now, Mr. Barger, in particular reference to F-82 doors, that designates a two-panel door, two separate panels of veneer interlocked or mortised into a door separated by a full thickness lock rail that is mortised into the stiles of the door, is that correct? A. That is right.

Q. And is there any particular standard as to the height of that lock rail from the floor?

A. Yes. They have specifically stated here "Height to top of lock rail from the bottom of the door" is 36½ inches. That, of course, locates it definitely. Otherwise it could vary anywhere.

Q. In other words, in a F-82 door you know the lock rail is going to be 36½ inches from the floor in all F-82 doors? A. Yes.

Q. Just in passing, has that anything to do with the striking place of the door, where the latches are placed on the door?

A. Generally speaking a latch is placed 32 to 34 inches from the floor, so it acts as a strengthening point at the place where the lock is placed.

Q. Keeping that in mind in those particular standards of design, would you refer, then, to the grade standards that are contained in Exhibit 10 that you now hold in your hand.

(Testimony of Cecil Barger.)

A. I have it here. [15]

Q. Now, would you recite the standards for Grade A F-82 fir doors as contained in Exhibit 10?

A. Well, the Grade A, "This stock shall be of 100 per cent heartwood, all vertical grain old-growth Douglas Fir, the faces which must be clear, with the exception that each stile may contain one carefully repaired pitch seam on each side, provided that such pitch seam does not extend through the piece nor exceed 3½ inches in length. Such pitch pockets shall not be over 35 inches from the bottom of the door. Bottom rail may contain one neatly repaired pitch seam the same as the stiles."

Q. Mr. Barger, what is there in Grade A standard in the observation, a cursory examination of a F-82 door, that immediately designates whether it is an A or B grade or a C grade?

A. Well, if it were an A grade it would definitely have vertical grain on all the solid wood members, the stiles and lock rail.

Q. By "vertical" is the grain not flat, and the vertical edges of the grain—

A. You see the grain, the year rings in the growth, on edge; you do not see them on the flat face. It would produce an appearance of lines, pencil-like lines in the face of the wood. There would be no flat or wavy grain. It would be very straight and parallel grain on the face of the stile.

Q. Is that true of Grade B, that is vertical wood and all solid wood—

(Testimony of Cecil Barger.)

A. It says of B, "This stock shall be of vertical grain faces, [16] with some coarse grain permitted." By that it means the space between these year rings may be wider. That is called "coarse" but still not flat.

Q. Does a Grade A or Grade B fir door, F-82 ever contain flat grain?

A. Not if it is up to grade.

Q. In other words, if it contained flat grain what grade would it be?

A. It would throw it into a C. A C, it says, "This stock may be of mixed grain"—that is vertical or flat. Naturally the vertical grain gives more strength to the door in its weakest dimension which is through the thin way, and therefore vertical grain makes it stronger.

Mr. Prendergast: If the Court please, may I have the Clerk have this photograph marked as Plaintiff's Exhibit 9 for Identification.

(Photograph of two doors, so produced, was thereupon marked for Identification Plaintiff's Exhibit No. 9.)

Mr. Prendergast: Would you please hand that to the witness.

Q. Mr. Barger, you now have in your hand a photograph that is marked Plaintiff's Exhibit 9 for Identification. Would you please identify that as to being a photograph of what.

A. It is a photograph I had made of standard F-82 door out of our stock and of A grade, and one of the doors typical of the [17] shipment that

(Testimony of Cecil Barger.)

we received in the shipment in the car in question.

Q. Looking at the photograph, Exhibit 9 for Identification, on what side of the photograph is the typical standard F-82 door?

A. The standard F-82 is on the left and the other door on the right.

Q. Now, with reference to design F-82, and with reference to grade, being A or B grade or C, would you say that that is a fair representation of a standard F-82 Grade A door on the left of that photograph?

A. Yes, that is an average door of that grade and type.

Q. And does it clearly show and is it a fair representation of the vertical grain as contained in Grade A?

A. Yes, that can be very readily seen in the photograph.

Q. Does the picture on the right of this exhibit, would you say that that was a fair representation, a typical door of not Grade A or Grade B but Grade C or lower and of not F-82?

A. Well, it is evidently not a F-82.

Q. Why?

A. Because of the location and width of the lock rail.

Q. And now as to grade?

A. And as to grade, the stiles and rails being flat grain it is evidently a Grade C or lower, and the panels, as indicated here, one showing a knot in

(Testimony of Cecil Barger.)

the face veneer and the other showing a void in the face veneer, could not even classify as a Grade C door because the faces shown of the plywood in those [18] panels is that typical of a reject side of a sound one-side grade, and would not be permitted in any door.

Q. Now, where did you obtain the door that appears on the right of that exhibit of which that is a photograph?

A. The one that isn't standard?

Q. The one that is not standard.

A. I bought it from Ruth Meyer.

Q. And that was one of the doors that was in controversy in this particular action?

A. That is true.

Q. And is it a fair representation or typical of the doors received in the car?

A. That is correct.

Q. That was shipped to you? A. Yes.

Q. Was that photograph taken in your presence?

A. Yes.

Q. And under your direction? A. Yes.

Q. And a copy has been heretofore submitted to Mr. Whitehouse or his representatives?

A. Yes, I gave one to Mr. Whitehouse.

Mr. Prendergast: If the Court please, I offer Plaintiff's Exhibit 9 in evidence.

Mr. Darling: We object to it on the ground it is not [19] properly authenticated and that the photographer who took the picture should be here

(Testimony of Cecil Barger.)

to state the circumstances under which he took it, that it was a picture that he developed and carried on in the ordinary background that you find in the introduction of pictures into court; in other words, that when it was taken the circumstances under which he took it, the development of the picture, the production of the picture.

The Court: It is admitted.

(Plaintiff's Exhibit No. 9, previously marked for Identification, was thereupon received in evidence.)

Q. (By Mr. Prendergast): You might hand those exhibits to the Bailiff at the moment. He will relieve you of them and I will proceed with a different matter.

As I understand your testimony, prior to this car which is in controversy, which car was shipped in January of 1948, your testimony is that through Ruth Meyer you purchased another car of F-82 doors.

A. That is right.

Q. And do you know who shipped that other car of F-82 doors to you?

A. You mean just these, as was typical of these cars—they move through several hands.

The Court: Which one are you talking about now, the one in suit? [20]

Mr. Prendergast: The one just prior to that.

The Court: You are talking about the one prior?

Mr. Prendergast: That is right, your Honor.

Q. I believe your testimony was that a week or

(Testimony of Cecil Barger.)

so before you had bought another car of F-82 through Ruth.

A. I don't know, but it was just prior to that we received from Ruth—it was from this Interstate or what I thought at that time was Austin Dodds.

Q. It came from Austin Dodds?

A. Yes, that is right.

Q. And was that car entirely up to standard as being F-82 doors? A. Yes.

The Court: Who is Interstate?

Mr. Darling: There is a corporation in the picture as defendant Interstate. I don't know if that is who he is referring to or not.

A. Let me refer to them as Austin Dodds.

The Court: Do you represent Interstate?

Mr. Darling: We represent the corporation, and the individual we represent was doing business under Interstate Lumber Sales.

The Court: Is there a corporation, too?

Mr. Darling: There was a corporation began in April called Interstate Lumber Sales, Inc.

The Court: And those and the individual clients the same, alter egos? [21]

Mr. Darling: No, there is a difference in ownership.

The Court: I suppose that will be developed?

Mr. Prendergast: As I understand it, it started out in January, from the records in Lane County, of Austin Dodds doing business. Austin Dodds, who had been in business for a long time, took in a partner, Mr. Whitehouse, and an assumed name was

(Testimony of Cecil Barger.)

filed, Austin Dodds Company, representing Austin Dodds and Whitehouse, and that continued in January, so far as we could ascertain. The assumed name record was there.

The Court: Who was on the shipping papers?

Mr. Prendergast: Well, it came from Austin Dodds on the shipping papers, and, so far, through the transaction, but the reason we stipulate, and we do in the pre-trial——

The Court: You don't need to go into that.

Mr. Prendergast: Austin Dodds is out of it.

The Court: Did you know Ruth Meyer personally? A. Yes.

The Court: Where had you met her?

A. Here in Portland.

The Court: How long had you known her?

A. Approximately a year up until this transaction.

The Court: Had you done other business with her other than these two cars of doors?

A. Yes, we had done other business with her consistently.

The Court: Different items? [22]

A. Yes, but primarily doors.

The Court: Then you bought other doors from her other than these two cars? A. Oh, yes.

Q. (By Mr. Prendergast): Some three or four weeks previously you had purchased a car which proved entirely satisfactory, and as far as you knew it came from Austin Dodds, is that correct?

A. That is correct.

(Testimony of Cecil Barger.)

Q. How did you get that information that it had come from Austin Dodds?

A. As I recall, Ruth either told me or it showed on the bill of lading that we received.

Q. In reference to the payment for that car, what method did you pursue, what is the practice during this time that we speak of, as of December, 1947, or January of 1948, in the purchase of mill-work through a broker, what payment, what method of payment?

A. Well, at that time in purchasing these cars as soon as the car was shipped and the bill of lading had been stamped as received by the railroad, the originating line, then that paper accompanied by Ruth's invoice stating what was in the car were sent to my bank for collection.

The Court: Where?

A. At Statesville. A draft was drawn on our bank and these papers accompanied it, and on receipt of the papers the bank [23] notified us and we would go down and take up the draft, and on the strength of the invoice as shown and the bill of lading indicating that there was actually a car of a certain number rolling.

Q. (By Mr. Prendergast): Keeping that in mind, but with particular reference to this car we are now speaking of, which is an Atchison & Topeka & Santa Fe——

The Court: Not the car in suit?

Mr. Prendergast: Yes, the car in suit. I am directing his attention to the car in suit. I want you

(Testimony of Cecil Barger.)

to develop to the Court what happened on that, how did you hear about this lumber, approximately when, and what happened?

A. Well, I would say that Ruth called me——

Q. That is Ruth Meyer?

A. Yes. ——in the early part of January and stated that she had a car of standard F-82 doors of A grade, and gave me the specifications on the car. It so happened that these specifications suited our needs at that time and we instructed her by phone to purchase the car for us, which she directly or promptly did; and, in the due course of time, perhaps a week or ten days, the papers that I referred to, the bill of lading——

Q. May I interrupt you right there. In her conversation with you in regard to this car and the offering saying that she had that available did she make any reference at all, Mr. Barger, to the source of these doors? [24]

A. She merely stated that they were coming from the same source that the last car she had shipped me came from, not stating maybe the source itself, but I knew the source from the previous bill of lading—from the same source, and she assumed that the door manufacturer would be the same.

Q. And then after you——

The Court: She what?

A. She assumed that the manufacturer of the doors which we would receive in the second car would be the same as they had been in the first.

(Testimony of Cecil Barger.)

The Court: Who had manufactured them, the manufacturer?

A. I don't remember the manufacturer, but the fact was they were very excellent doors.

The Court: Were they manufactured in the Northwest? A. Oh, yes.

The Court: Who paid for the phone calls; each party pay for his own?

A. Each party paid for his own, depending on who called whom.

Mr. Prendergast: May I ask, Mr. Barger, are you familiar with the custom of lumber brokers or millwork brokers at that time as to whether or not they made it a practice to disclose their sources of supply? A. Generally not.

Q. And why not, if you know?

A. Well, for protection to themselves. If they disclosed from [25] whom they were buying the material, why, there was very little reason for my not going direct to that source the next time and eliminate the broker's profit.

Q. In January of 1948 were fir doors scarce in the market? A. Very scarce.

Q. And had it been difficult at that time and prior thereto during the war years to obtain fir doors? A. Very difficult.

Q. Prior to the war was it the practice to buy fir doors through brokers or——

A. No, we bought direct from the manufacturer.

Q. And then, very briefly, what happened to the

(Testimony of Cecil Barger.)

fir door business that compelled you to go through brokers?

A. Well, during the war years the scarcity of lumber, of course, was general and the manufacturer of millwork items, fir doors principally, having no mills of their own, no stands of timber of their own, depending entirely on the open market for the purchase of upper grades of lumber, the shop grades that they used to produce this millwork, were caught in the squeeze and those mills who produced lumber were able to lay aside these shop grades and offer them to the door mills and demand and receive in return the completed product due to the fact that the mill would rather stay open and run on borrowed lumber than to close entirely.

Q. So the source of lumber controlled the supply of doors? [26]

A. Controlled the supply of doors, and the source of lumber received the doors in return as soon as they were manufactured, and they, not the door mills, offered the doors to the trade in general.

Q. And I assume the doors were marked up accordingly?

A. Oh, definitely; sometimes two and three times, quite well marked up.

Q. Just with reference to that as an illustration, F-82 doors in January or February of 1948 had what marked; that is, retail.

A. Well, we—You mean what we were paying for them?

Q. No, what you were selling them for.

(Testimony of Cecil Barger.)

A. Oh, we were selling them for around \$11½.

Q. And what is the market at the present time for the same type of fir door?

A. We sell the same type of door in the same grade for, oh, approximately \$7.

Q. And that has changed, then, since 1948?

A. Yes.

Q. And are you now buying directly from the mills again?

A. Yes, we started that last fall.

Q. The brokers and the mills who supplied the lumber have been eliminated?

A. Due to the supply of lumber being available again to the mills.

Q. Now, may we get back, then—Ruth Meyer informed you she [27] had available a door, F-82 and A grade, and wanted to know if you wanted it and that it was from the same source as the door you had bought some three or four weeks before?

A. Yes.

Q. And you told her to buy it?

A. That is right.

Q. And then what happened, Mr. Barger? That was in the early part of January, 1948?

A. That is right.

Q. Then what happened?

A. Of course, the next we heard on it was the receipt of the papers indicating the car was rolling.

Q. And what was the nature of those papers?

A. Well, it was the bill of lading showing the receiving stamp of the railroad, indicating to us

(Testimony of Cecil Barger.)

that there was a car of this number moving and her invoice indicating what was in the car, these three sizes of standard F-82 A grade doors, and on the strength of those two documents we paid the draft.

Q. In reference to the bill of lading, do you know where the bill of lading is?

A. We were required to render the bill of lading to the railroad for release of the car.

Q. So you have no copy of that? A. No.

Mr. Prendergast: I might ask Defendant if they have the [28] original copy of the bill of lading.

Mr. Darling: We do not have it.

Mr. Prendergast: I wonder if I might have Counsel ask if they kept a copy of the bill of lading.

Mr. Darling: My client states that they do have a copy of the bill of lading, that the bill of lading goes along with the car, with the papers, and you customarily do not keep a copy of the bill of lading. The railroad keeps it, as stated by the witness.

Q. (By Mr. Prendergast): But, at any rate, you did receive by mail a bill of lading—May I have this marked?

The Court: You have an invoice, of course?

Mr. Prendergast: Yes. I am going to develop that in just a moment.

The Court: What is this Letter of Credit we were talking about the other day?

Mr. Prendergast: We will develop that in just a second, your Honor. This should be marked as Plaintiff's Exhibit 6 for Identification.

(Testimony of Cecil Barger.)

(Telegram by Ruth Meyer to Barger Millwork Company, dated January 12, 1948, so produced, was thereupon marked for Identification Plaintiff's Exhibit No. 6.)

Q. (By Mr. Prendergast): You have Plaintiff's Exhibit 6 for [29] Identification in your hand, Mr. Barger. Would you identify the instrument?

A. Well, it is a wire from Ruth Meyer to Barger Millwork Company.

Q. And is dated what; what date?

A. It is under date of January the 12th and states: "1500 doors \$8.40 AT&SF 149509 on way. Please send guarantee."

Q. All right, now, was that the first notice you had these doors had been shipped?

A. That is correct.

Q. And I notice on the telegram, though, Mr. Barger, that it says 15,000 doors. Is that in error?

A. That is in error. It is 1500 doors.

Q. 1500?

A. That is all that could go in a car.

Q. That is all that would go in a car?

A. That is all that could go in, loaded full.

Q. Now, in reference to the telegram, that specifically identifies the carload of doors and the Atchison, Topeka & Santa Fe freight car, the car in which these doors were shipped, is that correct?

A. Yes.

Q. By car number? A. By car number.

Q. What is the reference to "Please send guarantee"? [30]

(Testimony of Cecil Barger.)

A. Well, it had been our custom on receipt of a wire indicating the car was rolling that we would have our bank at Statesville wire her bank in Portland a guarantee for approximately the amount that the invoice would come to, I suppose which she could use in turn to get the possession of the papers without actually having the money.

Q. In this transaction, so we may develop it with the Court——

The Court: That would be treated between the banks as money, that kind of a wire.

Mr. Prendergast: That is correct.

Q. And do you know what bank Ruth Meyer was dealing with?

A. The Bank of California in Portland.

Q. And do you know from your knowledge of Ruth Meyer and her knowledge of the business whether or not she had \$12,000 in the bank at any time of her own money? A. I wouldn't.

Mr. Darling: If the Court please, I object to that. My objection is on the ground that unless he can establish from his knowledge of her banking——

The Court: He can tell what he knows.

Q. (By Mr. Prendergast): This guarantee was to enable Ruth Meyer to deal with the Bank of California on the \$12,000?

A. That is the reason she gave me, stating she was unable to handle it on her own.

Mr. Prendergast: Now, if the Court please, I would like [31] to ask the defendants to produce the original of an order which is dated January the

(Testimony of Cecil Barger.)

12th, 1948, Ruth Meyer to Austin Dodds, Eugene, Oregon. I have the copy, but the original order—and it would be Plaintiff's Exhibit 3. May I have this document marked as Plaintiff's Exhibit 3, and may I also ask the defendants to please produce the original of an order of acceptance signed by J. C. Hendrickson dated January the 14th, 1948, which is marked in the pre-trial order as Order of Acceptance, Plaintiff's Exhibit 2. I think, Counsel, that we can stipulate that both of these documents are carbon copies, but that the one that the defendant has produced bears an original signature in red pencil and the copy has a carbon copy signature, being both the same, so that this is the only original that is in existence; is that correct?

Mr. Darling: That is right.

Mr. Prendergast: May I have this document marked as Plaintiff's Exhibit 2 for Identification.

(Document entitled "Purchase Order No. 184" on January 12, 1947, so produced, was thereupon marked for Identification Plaintiff's Exhibit No. 3);

(Document entitled "Order Acceptance" dated January 14, 1948, so produced, was thereupon marked for Identification Plaintiff's Exhibit No. 2.) [32]

Mr. Prendergast: May I offer at this time Plaintiff's Exhibit 6 into evidence, which is the telegram.

Mr. Darling: No objection.

The Court: Admitted.

(Testimony of Cecil Barger.)

(Plaintiff's Exhibit No. 6, previously marked for Identification, was thereupon received in evidence.)

PLAINTIFF'S EXHIBIT NO. 6

[Telegraph Form]

Western

Union

CF9 NL Pd-Portland Org Jan 12

Barger Mill Work Co.

1948 Jan 13 AM 8 30

15000 doors \$8.40 AT&SF 149509 on way please send guarantee.

RUTH MEYER.

15000 \$8.40 AT&SF 149509.

Mr. Prendergast: Mr. Bailiff, would you hand Plaintiff's Exhibits 2 and 3 for Identification to the witness, please.

Q. You now hold in your hand Plaintiff's Exhibit 2 for Identification, which is an order of acceptance, J. C. Hendrickson, of the Austin Dodds Lumber Company, and Plaintiff's Exhibit 3 for Identification which is an order, Ruth Meyer to the Austin Dodds Company, and I ask you upon examination of those exhibits, Mr. Barger, if they refer to this particular car in controversy and this particular shipment in controversy?

A. They evidently do due to the quantities, sizes and descriptions.

(Testimony of Cecil Barger.)

Mr. Darling: If the Court please, I object to the form of the answer—I don't object to the form of the answer, but I think without further qualification that what they "evidently" do doesn't have any bearing.

The Court: Well, you know whether they do or not.

Mr. Darling: Actually, we will admit that they can come into evidence. [33]

The Court: Certainly you will.

Mr. Prendergast: I am not so concerned with that as I am with the specifications contained thereon.

Q. Now, examining Exhibit 3, Mr. Barger, which is the order of Ruth Meyer, this order, does it bear a date? A. January the 12th.

Q. 1948? A. Yes.

Q. And is headed "Ruth Meyer, Agent"?

A. Yes.

Q. And it is to Austin Dodds at Eugene, Oregon, ship to the Barger Millwork Company, Statesville, North Carolina—

The Court: Is that word "Agent" typed on there or printed? A. Typed.

Q. (By Mr. Prendergast): And is for one "C.L."—That means carload—F-82 fir doors?

A. Yes.

Q. 1500 doors at \$8.15, is that correct; and it bears some other notations that are on the original and not on the copy that I have?

A. Of course, it lists the quantities of each in-

(Testimony of Cecil Barger.)

dividual size. It says "Immediate shipment, please sign and acknowledge by returning copy of order."

The Court: You didn't see any of these papers at the time? A. No, sir. [34]

Mr. Prendergast: No, but I have reference now, I want to identify this particular car in controversy with these particular orders, if they are the same doors, and ask you if there is any identity contained on there such as car numbers or order numbers that we could trace the identity.

The Court: Oh, we know they are the cars.

Mr. Darling: We will stipulate those are the cars.

Mr. Prendergast: All right; we will eliminate that.

Q. These particular exhibits you have in your hand refer only to the F-82 doors, and the acceptance, which is Plaintiff's Exhibit 2 for Identification, contains the grade which is shown as what?

A. A grade, allowing up to 2 per cent B, it says.

Q. And does that have reference to the Fir Door Institute standards as to F-82 and the grade—Do you know of any other standards?

A. I know of no other standard it could refer to.

Mr. Prendergast: If the Court please, I offer Exhibits 2 and 3.

The Court: He and Ruth Meyer didn't exchange correspondence up to this point, just the telegrams? They didn't confirm the telephone call by letter?

A. No, sir.

The Court: Only these documents?

(Testimony of Cecil Barger.)

Mr. Prendergast: That is correct. [35]

Q. Is that correct, Mr. Barger?

A. That is correct.

Mr. Prendergast: I have offered these.

The Court: Admitted.

(Plaintiff's Exhibits Nos. 2 and 3, previously marked for Identification, were thereupon received in evidence.)

PLAINTIFF'S EXHIBIT NO. 3

Ruth Meyer

Agent

Purchase Order No. 184

January 12, 1947.

To Austin Dodds Lumber Co., Eugene, Oregon

Ship to Barger Millwork Co., Statesville, N. C.

Routing Lowest thru rate.

F.O.B. car mill.

Quantity: 1 CL

Description: F82 Fir Doors

1000 2.8 x 6.8

400 2.0 x 6.8

100 2.6 x 6.8

Price: \$8.15.

Immediate shipment.

Thanks

Please sign and acknowledge by returning copy of order.

The Court: How about the telegram of this gentleman's bank, Mr. Barger's; how about the tele-

(Testimony of Cecil Barger.)

grams from this gentleman's bank to Ruth Meyer's bank; do you have that wire?

Mr. Prendergast: We have a copy, your Honor.

The Court: And did Mr. Barger give his bank any written instructions or just oral?

A. Just oral. At my request they sent this wire of guarantee; in fact, I went down and helped them phrase it.

The Court: You will put that wire in along with the other exhibits?

Mr. Prendergast: I will put it in now and have it marked.

The Court: Has Mr. Darling seen it?

Mr. Darling: I haven't seen it.

The Court: Let him see it.

Mr. Prendergast: May we have this marked Exhibit 17, which is an additional number to the present pre-trial.

(Copy of telegram by People's Loan and Saving Bank to Bank of California, dated January 15, 1948, so produced, was thereupon marked for Identification Plaintiff's Exhibit 17.)

The Court: How was Ruth Meyer paid?

Mr. Prendergast: It was handled entirely by the Bank of California and the People's Loan and Saving Bank. They sent the guarantee.

The Court: Whom did Ruth Meyer pay for these doors?

Mr. Prendergast: Austin Dodds.

The Court: How did they pay her?

(Testimony of Cecil Barger.)

Mr. Prendergast: By a draft they drew on the Bank of California on Ruth Meyer's account, which was guaranteed by Mr. Barger's bank to the Bank of California. They drew a draft on the Bank of California.

The Court: Were the shipping papers attached?

Mr. Prendergast: Were the shipping papers—in other words, Austin Dodds in order to protect themselves did not ship this car to Barger or Ruth Meyer. They shipped to themselves, so the car was their car on the railroad to its destination, Statesville.

The Court: That is an order bill of lading.

Mr. Prendergast: And it was in their name. They did not deliver the papers until they had sight-drafted Ruth Meyer's account at the Bank of California.

The Court: They drew on her probably through their own bank in Eugene.

Mr. Prendergast: That is right. [37]

The Court: With directions to present the draft to the Bank of California, and the Bank of California had a guarantee from this gentleman in the amount so they paid the sight draft.

Mr. Prendergast: But further papers went through to identify that car and be sure they were being shipped before the money actually came on through.

The Court: The bill of lading is the only thing from Dodds to Meyer, and then Meyer attached it to her own invoice; Dodds invoiced Meyer?

Mr. Prendergast: That is correct.

(Testimony of Cecil Barger.)

Q. Is that correct, Mr. Barger?

A. That is correct.

Q. The record will show that. Plaintiff's Exhibit 17, would you hand that to the witness. You have Plaintiff's Exhibit 17 for Identification, Mr. Barger. Would you state if that is substantially the telegram that was sent by your bank that you have referred to here as being a guarantee by your bank to Ruth Meyer's bank, the Bank of California?

A. Yes, this is the wire.

Q. And would you read the telegram, please.

The Court: You don't need to. Save time. I will read them over.

Mr. Prendergast: All right. I offer Plaintiff's Exhibit 17, your Honor.

The Court: Admitted. [38]

(Plaintiff's Exhibit No. 17, previously marked for Identification, was thereupon received in evidence.)

The Court: What date is it?

Mr. Prendergast: January 15th, 1948.

Q. Now, Mr. Barger, after receiving this telegram, which is Plaintiff's Exhibit 6, this telegram to you that these doors were en route on an AT&SF car, what next did you hear about this particular car?

A. Well, we didn't hear further from the car until its arrival in Fayetteville, at which time we were notified by the freight agent there.

Q. Can you give us the approximate date of that arrival?

(Testimony of Cecil Barger.)

A. As near as I can tell, it was not before the 27th nor later than the 28th of January.

Q. 1948? A. '48.

Q. Had you done anything in regard to this car as to diverting it from its destination?

A. Yes. The car was originally consigned to us at Statesville, and in the interval between receipt of the invoice and the actual arrival of the car, as was our custom, we had made an effort to sell the doors and had sold them in and around the Fayetteville area; therefore, we diverted the car en route by notifying the agent, the Southern agent at Statesville, to get the car before [39] it arrived and divert it to Fayetteville so that our truck could disperse the doors there and save all the hauling, extra hauling.

Q. How many miles approximately?

A. Approximately 175.

Q. 175 miles. Did Ruth Meyer know that you were engaged in the wholesale millwork business?

A. Yes.

Q. And do you know if the Austin Dodds Company knew that you were engaged in the wholesale business? A. I don't know.

Q. Did you receive any, have any transaction with the railroad in regard to this particular car as to freight on the cars?

A. Yes. The car arrived and when our truck was sent to them, our men to help dispose of the doors, the amount of freight that they had informed us was due on the car, which was supposed to be paid before

(Testimony of Cecil Barger.)

the car was released to us, had proved to be incorrect. They had applied the wrong rate, so we required the agent there to release the car to our employees on receipt of a guarantee from our bank that the freight up to the amount of \$1,000, I think, would be paid on presentation of a corrected freight bill.

The Court: How much was the freight?

A. Just under a thousand dollars, nine hundred and some dollars.

The Court: Don't they go under the lumber rate? [40]

A. No, sir. Finished millwork takes currently a rate of \$1.51½ against \$1.28½ on lumber. This agent, of course, on receipt of the telegram from our bank guaranteeing the amount released the car to our men.

Q. (By Mr. Prendergast): That was at Fayetteville?

A. Yes, that was Fayetteville.

Q. What was done with the doors immediately?

A. Sir?

Q. What was done with the doors?

A. Well, they immediately began unloading the doors and distributing them, and some of the dealers who bought the doors were loaded out at the car.

Q. Now, as I understand, these doors were sold before the car arrived to customers around Fayetteville.

A. Yes, because the shortage was rather severe, and, of course, in the case of doors a man knows

(Testimony of Cecil Barger.)

what he is buying purely from a description of it. You offer him a F-82 A grade door and he knows what he is getting.

Q. In other words, you had offered your customers F-82 A grade doors that were en route to you? A. That is correct.

Q. And you diverted them to your customers at Fayetteville? A. That is correct.

Q. And you say they unloaded—you mean your truck driver?

A. Our truck driver went out to open the car and check the doors [41] out to the customers, and in some instances deliver them in our own truck.

Q. Now, were you at Fayetteville?

A. No.

Q. You were at Statesville, is that correct?

A. Yes.

Q. Then what did you hear about the doors?

A. Well, one of the customers in Fayetteville who received some of these doors called me, I think on Wednesday or Thursday, shortly after the car arrived. He was one of the first to get out of the car.

Q. That would be what approximate date?

A. I would say the 28th at the earliest.

Q. Of January, 1948?

A. Yes. And he told me the doors were not what he had ordered and requested that I pick them up and replace them with the proper type door, and was rather vague. It was on the telephone, and he was rather vague as to what was wrong. I couldn't understand.

(Testimony of Cecil Barger.)

Q. Had you seen the doors? A. No.

Q. Was your truck driver familiar with grades and specifications of doors?

A. No. He knew sizes. They were stamped on there. He knows how to unload for each size. [42]

Q. The first information you had that the doors were not F-82 Grade A, you were informed by a customer that something was wrong?

A. Something. He didn't state what. He didn't get across to me that they were not standard make-up. I gathered it was the grade he was complaining of.

Q. What did you do then, Mr. Barger?

A. I immediately called Ruth.

Q. That is Ruth Meyer?

A. Ruth Meyer. And told her there was some difficulty on the doors. I couldn't give her too much information—that the doors were objectionable to this customer, and others in the meantime—I called her on Friday of that week, I think, which is about the 29th, perhaps, or 30th.

Q. What was your conversation with her, then, generally?

A. That the doors had proven unsatisfactory and for her to contact her source and so inform them, and as soon as I knew definitely what was wrong that I would give her more definite information.

A. And that would be about Friday, the 29th of January, 1948, is that correct?

A. Yes, as I recall.

(Testimony of Cecil Barger.)

Q. And then what was the next thing that happened, Mr. Barger?

A. Well, I didn't hear anything from her over the week end and expected something in the mail Monday, and nothing showed, [43] and Tuesday, and so finally on Tuesday or Wednesday I wired her. These doors were still in possession of the customers but they were becoming quite upset about it, and I wired her to urge her to let me know something.

Mr. Prendergast: May I have marked as an exhibit Defendants' Exhibit J for Identification.

(Penciled copy of telegram to Ruth Meyer dated February 4, 1948, so produced, was thereupon marked for Identification Defendants' Exhibit J.)

DEFENDANTS' EXHIBIT J

[Telegraph Form]

Western

Union

2-4 1948

Ruth Meyer
Davis Bldg.,
Portland, Oregon

Customers insisting return doors or make adjustment promptly. Am in spot so let me know something quick.

CECIL.

(Testimony of Cecil Barger.)

Q. (By Mr. Prendergast): You have Defendants' Exhibit J in your hand. Will you tell us what it is?

A. It is a copy of a wire I sent Miss Meyer on the 4th of February.

Q. Would you please read it to us.

A. "Customers insisting return doors or make adjustment promptly. Am in spot so let me know something quick," signed "Cecil."

Mr. Prendergast: I offer that in evidence, Defendants' Exhibit J for Identification.

The Court: Admitted.

(Defendants' Exhibit J, previously marked for Identification, was thereupon received in evidence.)

Q. (By Mr. Prendergast): Now, you say that was on the 4th day of February, 1948? [44]

A. Yes.

Q. And it is your recollection that was Wednesday, or Tuesday or Wednesday?

A. Tuesday or Wednesday, must have been.

Q. And then what happened, Mr. Barger?

A. Well, shortly after that I received a letter from her which she had written on the 31st stating that she was moving as quickly as possible on this, and I think perhaps stating that she was unable to get in touch with the Austin Dodds that day, which I believe was Saturday, and would try the first thing Monday. The letter didn't come until after I had sent this wire.

The Court: We would save time if you take all

(Testimony of Cecil Barger.)

the documents and we consider them all.

Mr. Prendergast: I would like to refer to this particular one, your Honor.

The Court: Well, you don't need to have him explain them.

Mr. Prendergast: All right.

The Court: All the exhibits on both sides that have been identified on both sides as pre-trial exhibits will be deemed admitted in evidence, bearing the same numbers as in the pre-trial, subject to such objections as have been previously stated or may hereafter be stated.

Now, then, he doesn't need to talk so much about these documents. Let him tell his narrative. I will read the documents.

Mr. Darling: In this one instance I doubt if we have this [45] particular letter—I am not sure of it—Defendants' A.

The Court: You were talking a minute ago about a letter from the woman to him. You have that letter?

Mr. Prendergast: Yes, we do.

Mr. Vonderheit: Plaintiff's 11.

Mr. Prendergast: Yes.

Q. Now, you received this letter from Ruth Meyer that had been written on the 31st day of January? A. Yes.

Q. And then what next happened; in narrative style, here, tell the Court what happened.

A. Well, the next thing that happened on it was the telephone call from Mr. McLaughlin of the Aus-

(Testimony of Cecil Barger.)

tin Dodds organization to determine first-hand the nature of the difficulty.

Q. Did Mr. McLaughlin identify himself?

A. Well, he told me who he was and what firm he represented.

Q. And this Mr. McLaughlin was the same Mr. McLaughlin who was an officer of Interstate Lumber Sales, Inc., now?

A. That is the impression I had.

Q. And he had been with Mr. Dodds before he had with Mr. Whitehouse and Mr. Dodds in the corporation, so far as you know? A. Yes.

Mr. Darling: I would like to interrupt at this time. Plaintiff's Exhibit 11, the letter, we want to save an objection to on the ground that it is a letter between those two parties [46] and we have no connection with them and we feel—I don't even know what is in that letter. I can't recall.

The Court: It is admitted subject to objection.

(Letter by Ruth Meyer to Mr. C. K. Barger, dated January 31, 1948, so produced, was thereupon received in evidence as Plaintiff's Exhibit No. 11.)

Q. (By Mr. Prendergast): Can you tell us approximately when that was in reference to the date of your telegram, the 4th of February?

A. This phone call?

Q. Yes.

A. It was, I would say, within a week of the time I had sent the telegram.

(Testimony of Cecil Barger.)

Q. Had you by that time, the time of Mr. McLaughlin's telephone call, had an opportunity to inspect any of these doors yourself?

A. Yes. On receipt of the objections from our customers we—and hearing nothing from Ruth—in the meantime we sent our truck down starting Monday and started hauling the doors back into our warehouse. The customers refused to accept them, and the first load, as I recall, came in Monday night or Tuesday morning. That is the first time I actually saw the doors to determine myself what was wrong with them.

Q. That would be about the 2nd or 3rd of February of 1948?

A. Yes. [47]

Q. And then by the time that Mr. McLaughlin had called you——

A. When he called me I had seen them, I knew definitely what was wrong both as to grade and type.

Q. Just to go back a little bit, did you get back from your customers all the doors?

A. All except one customer's who was building some houses and had been waiting for doors and when they arrived they were the sizes, and since there were no other doors in the houses, rather than wait indefinitely for more doors he agreed if we would let him have them for just what we had in them he would accept them, he would accept the doors on that basis and in view of the circumstances.

Q. Had those doors been sold to him before inspection?

A. Oh, yes, they were sold while the car was en

(Testimony of Cecil Barger.)

route. All of these had been. And the remainder, twenty-nine I think, were damaged on arrival of the car which were, of course, left with the railroad. They were left with the railroad for subsequent handling.

Q. In other words, they were left with the railroad while unloading? A. Yes.

Q. And sometime after that the railroad made an adjustment?

A. Well, later we filed a claim against them and they eventually paid the claim for the net amount.

Q. In whose behalf did you file the claim against the railroad [48] company?

A. We assumed we were filing it in behalf of the shipper of the doors, since the doors, not being what we had ordered, were not our doors. We did it purely to protect his interest on the shipment. It was the only thing that could be done with them.

Q. And the money that you received, the cost that you received from the one purchaser who kept the doors, did you hold that money?

A. Yes.

Q. And for whom did you hold that money?

A. Well, for the account——

Q. For the account of the shipper?

A. That is right.

Q. Now, Mr. Barger, I want you to tell the Court what your conversation was with Mr. McLaughlin.

A. Well, he asked what the trouble was on the doors and I told him in great detail both as to design and grade and explained to him why it was that we

(Testimony of Cecil Barger.)

couldn't accept the shipment as the doors we had ordered, and he, of course, not too familiar with doors it took considerable explanation.

The Court: He hadn't seen them probably.

A. No, sir, he hadn't seen these, and perhaps had never seen a carload of doors. I don't know. He didn't talk like he had.

Q. (By Mr. Prendergast): And then what did he say to you?

A. Well, that he would go back to the mill and attempt to get [49] an adjustment and for me to hold these doors until he could let me know something.

Q. For whom were you to hold the doors?

A. Well, I presumed for him since I had told him they were not the doors we had ordered and were unacceptable.

Q. Did you tell him definitely that you would not accept the doors or did you infer that you might accept them?

A. Oh, I told him definitely I couldn't accept the doors, they were not F-82 doors or A grade.

Q. Do you deal in any other doors, cull doors or salvage doors?

A. No. We are rather envious of our reputation of handling excellent, first-quality material and have no use for it.

Q. Do you have any outlet, Mr. Barger, for salvage doors or cull doors?

A. No. We deal entirely with retail lumber out-

(Testimony of Cecil Barger.)

lets and then in turn handle only standard, recognized merchandise, and neither nor we are set up in any way to dispose of off-standard.

Q. How many days after you inspected the doors would you say it was that you talked to Mr. McLaughlin?

A. I inspected them on Monday afternoon or Tuesday morning, and I would say that I talked with him possibly Wednesday or Thursday following.

The Court: Let's see; he talked—he called you?

A. He called me.

The Court: That is the first time you knew anybody with [50] the company?

A. That is correct.

Q. (By Mr. Prendergast): And did he tell you they would get in touch with you later in regard to this?

A. Yes. I understood just anywhere from hours to days later.

Q. Did you follow that up? Did you have any correspondence or conversation with anybody about these doors after that conversation with Mr. McLaughlin?

A. Only with Miss Meyer when she would call on other items I naturally insisted that she continue to push them for settlement since she was out here and she knew them and I didn't, that she continue to try to get some settlement made, to get them to tell me what to do with the stuff. There it was taking up valuable space, and——

(Testimony of Cecil Barger.)

Q. What did you do with the doors when you got them back from your customers?

A. Well, we put them in our warehouse to store them for them. We couldn't leave——

The Court: How much profit did she have in the transaction?

A. I understood she had 25 cents a door.

Mr. Prendergast: I think, your Honor, that shows from the invoices. One is \$8.15 and the other \$8.40.

Q. In warehousing these doors were you obliged to protect them in any other manner?

A. Well, we naturally insured them for the protection of the [51] owner. If they had burned in our possession he wouldn't feel that we had hardly done the reasonable, taken reasonable precautions. We protected them and covered them for insurance for the amount that was represented by the invoice from Ruth because from our standpoint that was the amount involved, and if the doors had been lost that is the amount that we expected to recover.

Q. Actually, you got back 1394 doors; that is, some were damaged by the railroad and some this contractor retained and put in houses?

A. That is correct. The remainder was 1394.

Q. 1394 doors, and for which you had paid \$8.40 per door?

A. That is correct.

Q. And which Ruth Meyer had paid \$8.40 less 25 cents commission, or \$8.15; is that correct?

A. That is correct.

(Testimony of Cecil Barger.)

Mr. Prendergast: So, in the pleadings there is a slight discrepancy of some doors and the actual claim will be a little less. I will have to compute that.

Q. Now, Mr. Barger, how often did you talk to Ruth Meyer about these doors after that?

A. I would say on an average of once a week as she would call me on other matters or I would have some reason to call her. There was, of course, always the discussion on what was being done to get them to take them off our hands. [52]

Q. Was she authorized to effect a settlement in your behalf?

A. Oh, no, she couldn't effect a settlement. She was only asked to try to get Austin Dodds to come through with some satisfactory—in other words, to rebate us, to pay us for what he had in them and dispose of the doors or work out however they saw fit, but get them to account. You see, we were aware of no action on their part at all until a month or so later. We had no correspondence with them up till in March.

Q. In March you received a letter from Austin Dodds Lumber Company signed by Mr. McLaughlin, which is designated as Plaintiff's Exhibit 1 in the pre-trial.

The Court: He remembers the letter.

Q. (By Mr. Prendergast): Do you remember the letter, Mr. Barger?

A. Yes, very well. It was the first I had had from them.

(Testimony of Cecil Barger.)

Q. Now, in that they refer to the fact that they had a commission in these doors. Previous to that had you known where the doors had come from? Do you know now who manufactured the doors?

A. Yes, I know now.

Q. And when did you learn who had manufactured the doors?

A. Well, I learned it in subsequent discussion here perhaps with Mr. McLaughlin. I don't know when I first learned it, but I was told then they had been manufactured someplace in California.

Q. Previous to the purchase of these doors and while the negotiations were being made for the payment of these doors, and what not, had Austin Dodds at any time disclosed to you that they were agent [53] for anyone?

A. No, it was not even disclosed that Austin Dodds was the other party. It was only intimated then, and they were referred to then as the same party and not by name because I was not supposed to know of their existence other than a vague some other party.

Q. Then you received this letter of March 19?

The Court: What do you mean "the same party"?

A. Sir?

The Court: Did you just use the expression "same party"?

A. What I said was that I didn't know of the definite existence—I mean I didn't know by name who this other party was. Miss Meyer in talking to

(Testimony of Cecil Barger.)

me on the doors merely stated they would come from the same party that the last car had, not stating who it was.

The Court: But that wasn't correct, was it? Had the previous car——

A. The previous car had come through her and had been good doors.

The Court: Had they come through Dodds?

A. I later found out they had, but I didn't know it at the time.

The Court: Oh, that was a correct statement.

A. Yes.

Q. (By Mr. Prendergast): But, so far as you knew, Austin Dodds [54] sold these doors, shipped the doors, came from Austin Dodds, and you knew nothing of any other manufacturer being involved, is that correct?

A. No, I didn't know a thing beyond Dodds.

Q. And it wasn't until March 9th that Austin Dodds was then maintaining that they merely had a commission?

A. That is the first I was so informed.

The Court: Is that your contention, Mr. Darling? That word "commission" caught my ear.

Mr. Darling: Well, our contention, of course, is that the commission in their sense—They look at "commission" in an entirely different sense.

The Court: Wait a minute. Is this correct, you bought the doors from Grant and you paid so many dollars?

(Testimony of Cecil Barger.)

Mr. Darling: Yes.

The Court: You didn't get a commission from Grant and use it—It wasn't on a commission basis? You bought the doors somewhere?

Mr. Darling: Yes, sir; that is, we bought the doors from Grant in accordance with the way we wish to qualify that, that we were following the ordinary custom and trade with wholesale dealers.

The Court: I don't see that makes any difference. I want to know the fact. You got an inquiry from the Meyer woman on doors and you located the doors with Grant and when you found [55] you could buy them from Grant you told her you could get the doors and you paid Grant for the doors and you resold them to Meyer, according to your theory, at an increased sum.

Mr. Darling: Yes.

The Court: So when he uses "commission," that is not a word, that is not your word, that is his word?

Mr. Prendergast: It is a word of Mr. McLaughlin's of Austin Dodds Company, "We are quite willing to forego our commission on these doors, which is very small, in order to compensate somewhat for the doors."

The Court: Mr. Darling, he should have said profit.

Mr. Darling: Profit.

Mr. Prendergast: I don't think that matters a great deal. This letter indicates they are going to

(Testimony of Cecil Barger.)

try to do something about the thing. They say this car was a "lemon" no doubt and that is the reason it is offered.

Q. Now, after the receipt of this letter of March 9th did you hear further from Austin Dodds or from the shipper?

A. Not until about the first of July I received a letter from them.

Q. That would be a letter written on June 25th, 1948, from Interstate Lumber Sales, Inc., which changed the name from Austin Dodds, and the letterhead says Interstate Lumber Sales, successors to Austin Dodds Lumber Company, and that is a rubber stamp on this letter and signed by the same Mr. S. P. McLaughlin. Now, [56] this letter would be marked as Plaintiff's Exhibit 4. It is a letter of June 25, 1948, to Barger Millwork Company. You received this letter?

The Court: Oh, yes, that is all agreed to. All of these letters are before the Court and are received by the people to whom they are addressed. That is in the pre-trial.

Q. (By Mr. Prendergast): In this letter they stated to you, "We feel responsible for this shipment and realize you have had a tough problem on your hands in trying to dispose of this stock. We have always stood behind our shipments and in event of claim on our cars have tried to work out a settlement with the customer fair and reasonable."

Now, this refers to the fact this car was sold to

(Testimony of Cecil Barger.)

you through Ruth Meyer in Portland, Oregon, by the Austin Dodds Lumber Company, sold to you through Ruth Meyer. And then it says——

The Court: What are you reading all that for? I have to read all that.

Mr. Prendergast: I understand that, but in order to ask him a question of what he did in all this——

The Court: He knows about the letter. Now go on to the next question.

Q. (By Mr. Prendergast): After you received this letter, they said to you in this letter that they were going to refund \$915, \$300 of which was to come from Ruth Meyer and \$615 from Austin [57] Dodds, and they enclosed a check for \$615?

A. That is correct.

Q. Now, did you ever receive \$300 from Ruth Meyer? A. No.

Q. Did you ever accept the \$615 in settlement of any claim? A. No, definitely not.

Q. And did you inform them through any source that you would not accept it?

A. Well, in a telephone conversation with Ruth within a day or two of receipt of the check I told her that it was an entirely unsatisfactory settlement and for that reason there was no point in her sending the \$300, it wasn't acceptable; and she suggested that I might in behalf of Dodds offer the doors with this amount off and see if it would move them, which I did.

(Testimony of Cecil Barger.)

Q. And then early in September you—That was in July—and in September you wrote to Mr. McLaughlin and informed Mr. McLaughlin that you were returning the check for \$615 which you had not considered and would not consider, and it was impossible to sell these doors at any price, is that correct?

A. Well, I wrote the letter after having made every effort reasonable with the allowance they wanted made.

Q. You so indicate in the letter? A. Yes.

Q. And then you informed them you were coming out on the Coast. What was the purpose of the trip to the Coast? [58]

A. Well, it was to try and straighten this out I was evidently making no progress as it was.

Q. And that is when that letter——

A. And I intended to work it out at that time.

Q. And then in reply to that letter, referring to that particular letter, you received a letter back from Interstate Lumber Sales signed by Mr. Whitehouse returning to you this check for \$615, this check being a check of June 25th which is the check you had just sent back to him; they sent it back to you? A. Yes, that is correct.

Q. And stated that that was all they were going to offer you, in effect? A. Yes.

Q. Which is a letter of September 23rd, 1948, from Mr. Whitehouse of the Interstate Sales Company to Barger Millwork Company.

(Testimony of Cecil Barger.)

A. I recall the letter.

Q. Now, did you come out here, then, Mr. Barger?

A. Yes, within about a month. I came out in October and contacted Mr. Whitehouse personally as soon as I arrived and had a conference concerning the matter, and subsequently during that visit two other conferences in an effort to work the matter out on a person-to-person basis. We hadn't made much progress by letters.

The reason I didn't bother to return his check the second time, there was no point in wearing the check out. Evidently he had made up his mind that he was not going any further. So I thought perhaps if I could see him personally and explain more in detail of why the doors were not usable at all to us—He, of course, was not familiar with doors. He was a lumberman, and a F-82 to him meant nothing, I imagine. It didn't appear to. And I brought this picture for the purpose of showing him the difference between a standard door and the door they had shipped and all the other evidence that I could to convince him that what they had shipped us was worthless.

Q. What is the value of these doors that were shipped? Do they have any value?

A. Not to us because they are not the type of merchandise we are set up to handle.

Q. To your knowledge is there any possible source of sale of those doors in North Carolina or your trade territory?

(Testimony of Cecil Barger.)

A. No. If there had been, I would have suggested them to him and suggested he try to sell them.

Q. Do you know of any other means of disposing of them other than fuel? A. I don't.

Q. Did you so advise Mr. Whitehouse of Austin Dodds when you came out here that fall?

A. I told him there was no disposition from our standpoint. I suggested maybe he knew someone on the East Coast that could [60] move them, that we would like to get them out of our warehouse.

Q. Approximately what is the cost of warehousing, a reasonable charge of warehousing these doors?

A. Currently in a nearby town, Brewster, Virginia, we are paying 5 cents per door per month to store similar doors in a regular warehouse. However, in my charges here I used 2 cents a door as a figure since the other figure evidently represents a profit and what not to the concern.

Q. In carting these doors from the customers back to put them in the warehouse did you go to expense?

A. We went to expense to begin with in selling the doors. We had a man on the road for several days, and some telephone contact, and then we had expense when our truck went to Fayetteville to distribute what we presumed to be standard doors, and we had further expense when we had to send back to each of these customers and pick up and bring back to our warehouse the doors.

(Testimony of Cecil Barger.)

Q. What would you say was a reasonable charge for the, in your opinion, for the cartage that you were obliged——

A. Well, for cartage alone I would say \$350 more or less.

Q. And then when you say \$500 is a reasonable sum, that is approximately two-thirds of what the actual figure, is that correct?

A. About two-thirds of what we figure for cartage, for sale, for telephone against this material, and for insurance in the warehouse and the cost of warehousing. They take up space that [61] we are having to pay elsewhere to provide for our doors now as a result of having to store these. We are renting space instead.

Q. At what profit have you sold these doors?

A. Actually the profit ran, oh, I would say approximately a dollar to a dollar and a quarter per door, based on the price I had sold them at the time I thought I had F-82 doors. We were getting anywhere from \$1.00 to \$1.75 for panel doors at that particular period, which represented around 15 per cent over our delivered cost.

Mr. Prendergast: I believe that is all of plaintiff unless the Court has something further he would like to inquire about—Oh, I do have and will introduce a Bank of California draft for \$12,600, with exchange, which is the amount, and the People's Loan Company draft of \$12,600.

The Court: They are marked.

(Testimony of Cecil Barger.)

Mr. Prendergast: They haven't been marked.

The Court: Are those new exhibits?

Mr. Prendergast: No. They haven't been marked, but they are in the pre-trial exhibit.

The Court: All right, Mr. Darling. You may cross-examine.

Cross-Examination

By Mr. Darling:

Q. As I understand, you were familiar with the market on doors in January and February of 1948? [62] A. Yes.

Q. And had been familiar with the market on doors in 1947? A. Correct.

Q. Now, did I understand that the market was good in January? A. Very definitely.

Q. Doors were hard to get?

A. Yes, that is right.

Q. And that market was still good in February?

A. Yes, there was no appreciable decline in February.

Q. Now, what about in March? Had the market started to go down a little bit?

A. There was a decline, a rather stated decline from perhaps March all along through the early spring and summer months.

Q. And between March and June you would say there was a steady decline in the market?

A. Well, perhaps I should explain that decline. The decline was not so much in the door market as

(Testimony of Cecil Barger.)

such. It was brought about by the fact that the door mills were becoming able to buy lumber for which they did not have to furnish the doors back; therefore, there were some cars of doors developing in the open market and naturally those cars of doors having no two or three middlemen's profit added on were considerably cheaper, and it was the elimination over a period of time beginning about February or early March through to about August or September of 1948; it was the gradual elimination of these intermediate markups [63] that brought the bulk of this decline. There was an actual decline in the true legitimate market of doors at the same time from about 15 off of list to about 30 or 33 off of list, which represents about a dollar a door in actual valuation, but the major decline was the elimination of the middleman.

Q. Now, that decline was along with——

A. A market decline.

Q. ——decline in lumber generally?

A. I don't know. There never has been a tie-in between lumber and millwork as far as the fluctuation in lumber up and down the scale. It has very little effect on the millwork because the bulk of the cost of millwork is from labor.

Q. But you did tell us, did you not, that your understanding of the market was the reason the doors were scarce, and the reason they were high and the reason they were hard to get was because of the supply of lumber which the door men used to make their doors?

(Testimony of Cecil Barger.)

A. It was the availability, not the cost of the lumber, that is involved. When the mill got the lumber it was at the going market price, which was up along with all other types of lumber, but not out of reason; but, after the doors were produced, then when they turned around and let the doors go back to the lumber people it was at that point that this tremendous mark-up began to appear. It was the lumber producer who made his mark-up on the doors, not the lumber that went into them, other than is [64] normal. I mean, that was general practice.

Q. I am trying to understand your analysis of the market for what bearing it will have on the case. As I understood your testimony, the reason that the doors were high-priced was, and hard to get, went back to the situation that the door manufacturers who in turn were faced with a tough problem of getting their raw material, so to speak, for the manufacturing of the door.

A. That is correct.

Q. So that any easing up in that raw material market, or if it became harder to sell the raw material—in other words, a decline in the lumber market as such would have an effect on the manufacturing, isn't that—

A. Since price wasn't involved, it would be an indirect effect. It was the availability; in other words, lumber of this grade couldn't be bought for money. It could only be bought for service. As

(Testimony of Cecil Barger.)

many things happened back then, their availability became not a matter of how much will you pay, but what can you do for me in return; and in money the figure was not involved. It was the scarcity, the actual availability. How can you get it? You can get it by only swapping back the finished product.

Q. And that was because of the tremendous demand——

A. Oh, certainly, because of the shortage of the grade of lumber.

Q. So you wouldn't be surprised, at least, that the door market went down at the same time that the lumber market was going down? [65]

A. I wasn't surprised in the least that the doors declined to the extent they did, because we knew that when the situation changed to the extent that the middleman or middlemen that had worked their way in there were finally removed due to the availability of more raw material on the open market, why, it would occur; and the fact that it was going to occur at this time was unfortunate, information we didn't have. Because, had we been able to determine this, it would have behooved us not to buy any doors at all.

Q. Now, the door market itself, would you say that January was a good month? A. Yes.

Q. Now, then, within the period of a month would the door market fluctuate every two or three days or seven days; would the door market be good, say, one week and from your standpoint you could

(Testimony of Cecil Barger.)

buy cheaper, and then maybe two or three days later it would be higher, but then two or three days later it would go back down; is that the way it went?

A. No, it is a steady fluctuation, much more gradual than that, in part to the fact that from the time you place an order for a car of doors it will be from thirty to sixty days before they get manufactured, and it will be an additional three to four weeks before you receive them due to the length of time for them to go across the country; so, for the market to fluctuate so rapidly is rather impossible due to the slowness of ordering [66] and receiving the goods involved.

The Court: How long does it take a car to cross the country?

A. At that time it was taking three weeks and sometimes four due to the situation of railroads, car shortages, they would hold them up en route. There was considerable confusion. Normally it can go across in a minimum of two weeks.

Q. (By Mr. Darling): Now, when Ruth Meyer called you and told you she had some doors and asked you if you were interested, did she quote the price to you? A. Yes.

Q. Did she tell you the price at which she was going to be able to get them?

A. No, not at the time, because it had no bearing.

Q. Would have no bearing on your relationship with Ruth Meyer?

(Testimony of Cecil Barger.)

A. No. Her commission was of no direct effect on me. What I paid her for them is my primary interest.

Q. Now, with reference to the custom and usages, as you know them, I want to ask you to suppose the hypothetical situation that Ruth Meyer had told you that she had these doors, and, as I understand, you would tell her yes, you would like to have them, and the price was acceptable. Suppose in the meantime she had found a market 50 cents a door higher or 25 cents a door higher. Would you with your knowledge and understanding at least of the usages feel that she would be compelled to sell [67] to you?

A. I don't quite understand.

Q. Well, I will try to rephrase it. Take this actual situation that happened. Ruth Meyer called you and said, "I have a carload of doors." You said, "All right, the price is acceptable and I will take them." Now, suppose Ruth Meyer had called you a week later and said, "I sold that carload of doors to another customer of mine." Would you consider that under those circumstances that you had any claim of any type against Ruth Meyer?

A. Well, I hardly know. A thing of that type—I can't see why it would happen; if she called me and accepted my order verbally for a car of doors, I would assume I had placed an order with her for a car of doors, and why she would call me and tell me she had sold my car to someone else, it wouldn't

(Testimony of Cecil Barger.)

seem to make sense. I can't imagine what I would do under a circumstance I can't imagine arising. Why would she offer me a car of doors and not have them then?

The Court: We will recess until 1:30 p.m.

(Noon recess.) [68]

Afternoon Session

The Court: You may proceed.

CECIL BARGER

thereupon resumed the stand in behalf of the Plaintiff and was further examined and testified as follows:

Cross-Examination
(Continued)

By Mr. Darling:

Q. Mr. Barger, before lunch we were talking about how you would view this transaction with Ruth Meyer in which she told you she had a car and you said you were interested or were willing to buy the car. Now, it wouldn't have made any particular difference to you, would it, whether you got that particular car she was talking about or another car that she might have obtained from someplace else?

A. I don't think so so long as they were identical for all practical purposes.

Q. In other words, a carload of F-82 doors?

(Testimony of Cecil Barger.)

A. The only thing that might enter in there is the time element. If she offered me a car, that is in a particular position; that is, it has been manufactured, and sometimes it might even be en route, and something that has been offered to her and she offers here, there and yonder, sometimes by letter and sometimes by phone—in this case the time element entered in whereby she [69] offered by phone.

Q. But, in this particular case there wasn't any of those particular circumstances which would make any particular——

A. I assumed the car wasn't moving when she offered, but that is an assumption. It might have been.

Q. It might have been anywhere from three weeks to a month before you got the car?

A. No, she gave me definite specification, "We have this car now." Whether it was being shipped or being loaded I don't know. She just offered me the car, would I be interested. You see, I had no choice of specifying, I could take it or leave it as it existed.

Q. But as far as the shipping time—I am trying to get this clear—when you ordered I think you told us that the shipping time varies from three weeks to sixty days.

A. Oh, if you were to place an order on your own specifications.

Q. You couldn't rely on the shipping time be-

(Testimony of Cecil Barger.)

cause of the condition of the railroad lines; that is as I understand you told me. A. Yes.

Q. Now, let me go back for a minute to your testimony concerning the time that you received the doors, or I gather it was the 27th or 28th of January, 1948, those doors came into Fayetteville?

A. That is a guess on my part as being as close as I could estimate the probable time in view of the telephone conversation from the agent and so on. [70]

Q. Well, now, that would be around Tuesday or Wednesday, we will say. I am not sure, but I think the dates on Tuesday or Wednesday would be January 27th or 28th on the calendar.

A. I think that is reasonable.

Q. Then, do I understand that about the 30th you called Ruth Meyer and told her that you had heard that they weren't just right and you weren't too sure what it was but there was something wrong?

A. As I recall, it was Friday afternoon that I called her, which would be the 30th, I think, yes.

Q. And then you received sometime on Monday or Tuesday of the next week a letter from her stating something about she had—a letter dated January 31?

A. No, I didn't receive that letter until after I sent a telegram on the 4th. She had written the letter.

Q. You sent a telegram to her on the 4th?

A. The 4th, which is a Wednesday. Not having

(Testimony of Cecil Barger.)

heard anything on Monday or Tuesday as I expected, I finally wired her on Wednesday, the 4th, and the letter she had written on January the 1st, which was the Saturday prior, arrived in Statesville after I sent the telegram, either that afternoon or the following morning.

Q. Now, on the 4th when you sent this wire, as I understand, the goods, the doors were still in the hands of your customers?

A. They were being hauled back in at that time. The first [71] load was sent after on Monday. It would be about the 2nd, I suppose, and we started bringing them back in on about Monday, and I had seen the first load of those. There were about five loads to haul them back in. You see, we only got about 300 doors to the load.

Q. Now, this telegram you sent on the 4th, what did you say to her in the telegram?

A. Well, the gist of it was that I wanted her to get some action from her supplier, to let me know what to do with the doors.

Mr. Darling: Could I see Exhibit J.

A. The exact statement I used, I don't remember.

Q. (By Mr. Darling): I will hand you Defendants' Exhibit J which was introduced by the plaintiff. That is the wire that you sent on the 4th, is it not?

A. That is right.

Q. Now, did that wire state something about the

(Testimony of Cecil Barger.)

doors or indicate the doors were in the customers' hands? What does it say?

A. I say, "Customers insisting return doors or make adjustment promptly. Am in spot so let me know something quick."

Q. Well, now, when did you first inspect the doors?

A. Either Monday evening or Tuesday morning, out of this first load that was returned on Monday. You see, it takes about a day for the truck to go to that area, Fayetteville area, and [72] load and return.

Q. In other words, you had received some doors before you sent this wire?

A. Yes, I had seen the doors.

Q. At Fayetteville, or the several loads?

A. This first load that had come back in, I had seen it by the time I sent this wire.

Q. Well, then, when you sent that wire you didn't mean what I might think it meant; in other words, that the customers still had the doors and were insisting on——

A. Well, this wire was sent as a result of not hearing from this telephone conversation. At the time I talked with her on the phone the customers had all the doors, and when I——

Q. But, they hadn't told you what the defects were.

A. Specifically what was wrong, no, just that they were unsatisfactory in a general way. I was

(Testimony of Cecil Barger.)

led to believe they were not up to grade, because the customers were not too specific.

Q. But at the time of this wire you had seen some of the doors?

A. I had seen them, yes, one load.

Q. And then you got your letter from Miss Meyer dated January 31 to you, or you got that letter?

A. About Wednesday morning—I mean about Wednesday evening.

Q. You mean on the 4th, the same day?

A. Either that day—later that day—any time after I sent this wire. It was right after, within a day. [73]

Q. And then following that time the customers did send back some more doors?

A. Well, you see, we had been asked by all the customers without exception to pick up the doors, and I was hoping to stall the operation until I could hear something from her, but several of them became very insistent that we take them up, they didn't want them under any circumstances at all, and those that were pushing us the hardest we started hauling back in on Monday. That is why I had already seen the doors, even though my wire would indicate just in a general way that the doors were still in the customers' hands. Part of them were and part weren't.

Q. All right, then, after the 4th you got the rest of the doors back?

(Testimony of Cecil Barger.)

A. Yes, by the end of the week they were all back in our shop.

Q. And when did you have them graded?

A. Have them graded? I didn't have them graded.

Q. Well, did you grade them yourself?

A. It shouldn't be necessary to grade doors bought out of, on standard specifications, because it is stipulated that the doors shall be grade marked. These were not, however.

Q. Did you inspect the doors then?

A. Yes, I saw them as they came in. I looked at them.

Q. All the doors?

A. Not piece by piece. I was in and out as they were unloading the trucks. [74]

Q. How many doors did you see?

A. Actually see, I would say 200 out of 1500.

Q. You saw 200 of them?

A. I would say that.

Q. Now, when you made a statement concerning Exhibit 9, which was a picture of that door of which this is a copy, that the door on the right was typical of all the doors in this shipment, you meant it was typical of the 200 doors that you saw?

A. No. I accepted the word of my employees who handled the doors one by one that it was typical. I asked them to pick out a typical one. They had seen them all and I asked them to.

Q. Then they picked out this typical door?

(Testimony of Cecil Barger.)

A. That is right.

Q. So you don't know of your own knowledge that this was a typical door?

A. Only to the extent it was typical of the 200 I saw of the 1500.

Q. That what?

A. That it was typical of the 200 of the 1500 that I saw.

Q. That is what I wanted to get.

A. No, I didn't see each individual door myself.

Q. Now, you were out here in the summer, or September, wasn't it, of '48?

A. I was here in October.

Q. October, '48? [75] A. Yes, '48.

Q. And I recall that you said that during that time you had several conferences with——

A. Mr. Whitehouse.

Q. ——Mr. Whitehouse. Did you show him the picture at the time?

A. I showed him the picture at the first conference, which was in Eugene.

Q. Was there any discussion of the picture?

A. Nothing except an explanation to the effect that that was a typical door of the group, and the purpose of the picture was primarily to show the type differentiation.

Q. Didn't you at that time say something to this effect, that "Naturally I picked out the worst door."?

A. I don't recall.

Q. Now, this conversation with Mr. McLaughlin

(Testimony of Cecil Barger.)

that you testified to, if I get the time schedule right, was that the doors came into Fayetteville January 27 or 28 and then you received a protest by phone and you called on the 29th to Ruth Meyer.

A. I called on the 30th, I believe.

Q. On the 30th, a Friday? A. Yes.

Q. And then some of the doors came in on a Monday, and you sent this wire on February the 4th.

A. Wednesday. [76]

Q. On a Wednesday. And then you got the letter from Ruth Meyer dated January 31, that day or the following day, and then the rest of the doors came in by the week end? A. Yes.

Q. And by that time you had fully satisfied yourself as to what the situation was on these doors by reason of all your men handling these doors on that week end, is that right?

A. During the week that they brought them in, yes.

Q. And the principal bulk were brought in after Wednesday, isn't that right?

A. Well, it was a continuous process, about a load a day for five days, Monday, Tuesday, Wednesday, Thursday and Friday.

Q. And it was about the following Wednesday, then, that you had this call from McLaughlin?

A. The date of the call from McLaughlin is rather vague. I couldn't state that it was within—It may have been within that same week, later that week, or the following week. It was very shortly

(Testimony of Cecil Barger.)

after this complaint had been made to Miss Meyer, and it was the first contact I had from anyone, including Miss Meyer, as to what was actually being done, I mean as to any actual action on the rejection.

Q. Now, you knew that these doors had come some way through Austin Dodds, didn't you?

A. I knew they had come from another source than Miss Meyer.

Q. Wasn't the bill of lading made out to Austin Dodds at [77] Fayetteville or at Statesville, as you mention?

A. As I recall, it was made to some other firm.

Q. And you read that when you signed it?

A. Possibly so.

Q. So you knew at the time who this person was who procured the doors?

A. It is quite possible since that was of no direct interest; besides Miss Meyer, you see, I got doors from any number of people.

Q. You mean of no direct interest because you looked to Miss Meyer who sold you those doors?

A. I didn't understand.

Q. You say it was of no particular interest to you whose bill was on this, whose name was on this bill of lading or who actually sent them because you got the doors from Miss Meyer?

A. That is right. I depended on her to buy my doors and where she got them was of no particular interest to me.

(Testimony of Cecil Barger.)

Q. And you depended on her to make any adjustment?

A. No, I don't depend on her for adjustment. There were no adjustments before this time to be made.

Q. Never had any trouble with doors?

A. Never in any particle; we never had any trouble in style, or grade, on the shipment to this, including the previous car from Austin Dodds.

Q. Which you knew at that time had come from Austin Dodds, the [78] same shipper?

A. I very likely was aware of that fact.

Q. Well, now, the only thing I want to get your information straight, you did say, I think, that you got your, you talked to Mr. McLaughlin about a week after you sent this wire to Ruth Meyer.

A. My recollection was that it was within a week of that time, not more than that.

Q. Let's put it this way, then: Was it—You really became definite in your knowledge of what these doors consisted of following——

A. On Monday, about the 2nd of February was the first date that I saw the doors and knew definitely what was wrong with them.

Q. Well, you saw some of the doors?

A. Yes.

Q. But you had no idea that they all had splits in them like that?

A. Well, the splits were not the basis of the

(Testimony of Cecil Barger.)

difficulty. I don't maintain that any but that one had a split in it.

Q. As far as you are concerned, this may be the only one that had a split in it?

A. Had a split panel; that is quite possible.

Q. Then, as far as you are concerned, your protest on the doors was that they were not F-82 doors?

A. Well, the grade. The split panel has nothing to do with the [79] grade. That split panel wouldn't be allowed in there on a C grade. That was a reject panel. It had no business in any door under any circumstance, and I don't maintain any of these other doors had it, even those that were offered in Grade C. That type panel wouldn't be allowed in any grade.

Q. You didn't check the rest of the doors?

A. No. I just assumed all the rest had good panels as far as the panels were concerned.

Q. All right, then; these doors, as far as your statement that they are typical, you are leaving out the split panel?

A. Yes, that is true; the split panel is not intended to be part of the "typical."

Q. This door that you said you took out of your warehouse, had that been treated with Rez?

A. Neither one, as far as I know, though there is a possibility the standard door had been dipped in, not Rez but some form of sealer. We had some doors that were. It was an extra charge which

(Testimony of Cecil Barger.)

didn't add anything to the door, but it's like the automobiles you bought during the war, they added everything they could.

Q. Then, in order not to take any more time on this, as I gather, you sent the wire on the 4th?

A. Yes.

Q. And then when you received a call from McLaughlin you had as of the time you talked to McLaughlin checked the doors and [80] seen the 200 doors and they were all back in your warehouse?

A. I can't state as to that fact. Mr. McLaughlin called me on his own initiative, and when I talked to him I don't believe I stated to him that I had seen all of the doors and that I knew for a fact that they were all like that. It was a logical assumption, though, in view of the fact that the men that I employed seen all the doors and they told me they were all this odd type and that the grade generally was low, but it was not a definite statement on my part that I knew for a fact at that time that they were.

Q. You mean you sent some employee over to see the customers to check the doors?

A. No. You see, our employees went to Fayetteville and took the truck to supervise the unloading, merely counting a certain door of a certain size. There was not a door of any kind in the car of F-82.

(Testimony of Cecil Barger.)

Q. Then at the time they knew they were not F-82? A. My employees?

Q. Yes.

A. But they didn't know the doors were supposed to be F-82. They were merely told to unload a car of two-panel doors.

Q. Well, you never received any but F-82 doors?

A. That is right, but they wouldn't feel particularly surprised if we did it. They had no reason to suppose we wouldn't receive some other type. They have orders for so many doors of a certain size, [81] two-panel, and that is what they filled.

Q. Did you ever state to anyone that there was about 70 per cent B grade in this car?

A. I don't recall. I would hate to make a guess of that type on it since I didn't grade them one by one. I don't think I could hardly afford to make a statement of that type.

Q. And, as I understand, you did make a claim on the doors on some damage to the doors from the railroad company and received some money for that, is that right?

A. In view of the fact that when we unloaded the car there were some damaged doors in there which evidently were damaged in shipment we left those doors with the agent with the instructions or with the statement that there would be a claim filed against them.

Q. And did you file a claim?

A. We later filed a claim.

(Testimony of Cecil Barger.)

Q. When did you file a claim?

A. Oh, it was perhaps within a week of the time we unloaded the car in Fayetteville.

Q. You had got them all back in the warehouse?

A. Well, the time there wouldn't enter into it since our filing of the claim would have followed subsequently whether we accepted the doors or didn't. It would only seem logical—we couldn't leave doors at the railroad that weren't owned by anyone.

Q. Did you ever receive more than one call from Mr. McLaughlin? [82]

A. Well, I received the one from him at that time. I don't recall him calling me any more.

Q. Did you ever call him?

A. Not that I remember.

Q. And the first letter to McLaughlin or the people that he worked for was sometime in March, is that right?

A. As I recall, I wrote a letter to him in answer to—No, I believe I wrote him a letter which his first letter answered. I was becoming rather concerned over the length of time that was passing and our not having heard anything except indirectly from Miss Meyer in telephone conversation and an occasional paragraph in a letter concerning other matters.

Q. In the meantime you had written other letters to Meyer?

(Testimony of Cecil Barger.)

A. Well, naturally on most every letter that I wrote her or every phone conversation I would make some mention of the matter and ask that she do what she could to push it. There was nothing to talk about. There was a rejected batch of doors and we wanted to know what was going to be done on it. You see, we were out the money on the doors. That was our concern. We had doors that were worthless to us and the money was paid. We were not in a very good spot.

Q. I would like to hand you Defendants' Exhibit M, and at the same time may I have the Bailiff hand these other exhibits, Defendants' Exhibits N and O. Calling your attention to Defendants' Exhibit M, is that a letter from you to Ruth Meyer?

A. Yes.

Q. Now, calling your attention to Defendants' Exhibit N, is that a letter from Meyer to you?

A. Yes.

Q. Now, to Defendants' letter O, is that a letter from you to Meyer? A. Yes.

Q. That is all on those. I wanted to identify those in the record.

Now, there seems to be a little misunderstanding between a broker and a wholesaler. Do you have any conception,—or, I will put it this way—will you please tell us what you consider the position of a wholesale lumber dealer to be under the custom and usage of the lumber trade and the door trade.

(Testimony of Cecil Barger.)

A. You mean someone in Miss Meyer's position?

Q. Someone that is called a wholesale lumber dealer.

A. Well, of course, my idea of it would be maybe incorrect in that. I am not too closely allied with that phase of the business; however, my conception of it is that they are a person who receives offers of materials of different types in carload quantities, of course, and in turn offers those commodities to some source that she knows of, or that the person knows of, that might possibly use that; in other words, maybe she is offered in this instance a car of doors and she knows of our [84] account or several of us that use doors and she offered them to us. That is what happened in this case.

Q. Then your understanding of a wholesale lumber dealer is purely an intermediary bringing two people together?

A. They don't bring them together as a general thing.

Q. In buying and selling?

A. They go to great pains to see they don't get together; however, they do serve as an intermediary and do keep the two parties secret from each other if it is possible.

Q. As a matter of fact, on that point isn't it your experience that after a wholesaler has dealt with other persons in the business for a while that then they begin to have faith and trust in them and

(Testimony of Cecil Barger.)

they don't mind telling them who their sources of purchase or supply are?

A. I suppose that would vary with the individual, how trusting he was, how much he knew about human nature.

Q. Well, now, you wouldn't be surprised in this situation with Ruth Meyer being a wholesale lumber dealer, or whatever you consider her to be, that a number of people who sold to her would know who her customer was, would you?

A. I suppose they could find out in the due course of time through some means or other. I don't believe she would tell them of her own volition, maybe.

Q. Well, to make very clear your conception of a wholesale lumber dealer—because we feel it is important to us—assume [85] that you were a wholesale lumber dealer in the situation of Ruth Meyer or a wholesaler under the customs and usages of the trade, and you purchased lumber from another wholesaler and then you sold that lumber to a customer, would you consider that you were thereby involving the customer in any contractual relationship with the one you purchased your goods from?

Mr. Prendergast: I object to that question. It is calling for a conclusion of the witness on a question of law.

The Court: Sustained.

Q. (By Mr. Darling): Now, do I understand

(Testimony of Cecil Barger.)

your interpretation of the position of a wholesale lumber dealer as far as usages and custom in the trade are concerned, that that wholesale lumber dealer is in the position as you have testified to of a broker or merely an agent for, or customer——

Mr. Prendergast: If your Honor please, I object to that. That calls for a conclusion of a point of law.

The Court: Sustained.

Q. (By Mr. Darling): Now, there has been considerable talk about this \$300 that Ruth Meyer was to give to you as part of this settlement in June that was offered by that letter of June 25th; you recall that?

A. I recall the letter stating she was going to.

Q. Now, when you were out here in October of 1948 was Ruth Meyer present at any of the meetings that you had with Mr. Whitehouse? [86]

A. She was present at the first of the three meetings, yes.

Q. At that meeting do you recall that Mr. Whitehouse asked Ruth Meyer if she had paid you \$300?

A. I don't recall the subject being discussed.

Q. Now, I believe you stated in your testimony with reference to this letter of September 23rd, 1948, written to you under the name Interstate Lumber Sales by Mr. Whitehouse, that following the receipt of that letter you stated that you knew that they would do no more, that that is all they were willing to do.

(Testimony of Cecil Barger.)

A. Well, that, of course, was an assumption on my part based on what had been said at that time. In fact, I am not certain but what the letter at least intimated that, if not stating it outright, that that is all they could do. I assumed they meant what they said. He left me feeling as if he had no intention of making any further effort in the matter.

Q. And he sent you the check on the condition you accepted the check, and that was all?

A. He sent the check back. He didn't state any conditions, as I recall, in that second letter. He merely returned the check which I had already rejected once.

Q. Now, wasn't there a difference in the way the check was sent the two times?

A. Not that I recall.

Q. Do you recall the language of the first letter of June 25th, 1948, in which it was said that this was settlement and hoped [87] that you were satisfied, and you would get another \$300 from Meyer?

A. Well, I would have to read the letter to refresh my memory so that the letter would indicate all that.

The Court: What is the difference? What is the significance?

Mr. Darling: Pardon?

The Court: What is the difference?

Mr. Darling: In the two letters?

The Court: Yes.

(Testimony of Cecil Barger.)

Mr. Darling: The position of ourselves is that there wasn't any condition attached to the letter of June 25th but there was a condition attached to the letter of September 23rd.

A. What was that condition?

Q. (By Mr. Darling): As I gather, that as you have already told us, that the condition was that this check was being sent and that was all they would do and that if you wanted to take this check then it was all over with.

A. Well, I didn't take the check, of course.

Q. You kept it, though.

A. Well, it remained in my possession to avoid wearing the thing out. It was getting rather fragile.

Q. And you have retained the check?

A. It was my intention in seeing that it stuck this time. I tried mailing and it didn't stick.

Q. Did you hand it—— [88]

A. No, I wasn't given an opportunity.

Q. Not even in the three times?

A. No, we never got around to that point. We never did get in the discussion that far. It became evident long before we got to that place that there was nothing, that the defendant had no intention of making any effort to give us any relief whatsoever, and rather than hand him the check I turned it over to an attorney along with the other file to do with what was saw fit, whatever was logical. You see, I didn't know of the legal implications. I think the defendant knew that his check was available

(Testimony of Cecil Barger.)

to him on request at any time, that it had been rejected. I don't think there was any doubt in his mind about that, as far as his getting it. He had merely to say, "Well, may I have my check?" It hadn't been cashed, he was not out his money. I was the one that was out the money.

Q. If I recall correctly, you said that shortly after receiving that letter of June 25, 1948, in which this \$615 was sent together with the statement that \$300 would be sent, as they understood, from Ruth Meyer, that you called Ruth Meyer and told her that it wasn't satisfactory?

A. Well, it so happens that Ruth had called me on another matter within a very short time, less than a week, a matter of a day or two. And in the conversation I told her that I had received this check and that it was entirely unsatisfactory as far as covering the loss that we would sustain if we accepted [89] the doors with that check, to make them right to get us our money back; and she was going to take the matter up further with them, telling them that it was unsatisfactory, and in the meantime suggested that I make an effort to sell the doors, offering them at a reduced price based on the amount that this check represented per door, which as I recall was 60 or 61 cents per door.

Q. Why didn't you call the Interstate Lumber Sales or Mr. Whitehouse or Mr. McLaughlin that you had been talking to and had had letters with?

A. I had never called him on the matter directly,

(Testimony of Cecil Barger.)

and at this stage—This was about five months after the thing had happened—the necessity for making a phone call about the matter at that stage of the game seemed a little far-fetched, and I had still—it was much simpler to tell him; she was right here in the same state; she had conversations with him, I presume, right along and could tell them in turn that it was unacceptable.

Q. You mean you had been considering her as the intermediary between you and Whitehouse?

A. In the settlement?

Q. Yes.

A. Well, hardly, because they had contacted me directly. They had by-passed her so often——

Q. Well, then, why didn't you contact them directly? [90]

A. Well, I hardly can tell you why I didn't. Why should I have?

Q. Well, it just seems a little strange to me that you at one time rely on the fact that they dealt with you directly and then at the next moment you rely on them talking to Ruth Meyer and having her contact them, and then the next moment you say, "Well, Ruth Meyer didn't have anything to do as far as I was concerned with working out this settlement."

A. Miss Meyer had been passing along information from me to them on a settlement for the handling of this disagreement on the doors for the purpose of acquainting her with what was going on.

(Testimony of Cecil Barger.)

In some instances we by-passed her like when Mr. McLaughlin called me. He called me directly. He didn't call her and have her call me. It was for the sake of finding out first-hand just what the trouble was.

Q. But you did know that she had been passing on information that she got from you to the defendants in this case?

A. Oh, we purchased the doors through her and it seemed logical to keep her informed of what was going on even though they had taken the matter out of her hands, and quite often something happened between Interstate and us that I would later write her or tell her on the phone what happened. She wasn't acted through directly, but I made an effort to keep her informed.

Q. As I understand your comment, you recognized that the information she would get from you she would pass on to them? [91]

A. It would seem logical. She would tell them since she was interested indirectly at least in seeing the matter settled. She wanted to continue to sell us doors and naturally she didn't want anything like this hanging open unsettled.

Q. That is right, and you recognized her as a funnel, a channel of information, or a funnel through which information went to them?

A. No. I recognized the importance of keeping her informed of what was done between them and us purely as information as to what was going on.

(Testimony of Cecil Barger.)

Q. Assuming that she would pass it on to them?

A. In most cases it was a direct thing, because she had to be told on the side. In this particular instance I had been instructed, as I recall, by Mr. McLaughlin in the first conversation to make an effort to move the doors for them; in other words, to move the doors in their behalf, I assumed. I had no reason to try to move them on my behalf; they weren't my doors.

Q. Were you considering Ruth Meyer as their agent in this connection?

A. As their agent?

Q. Yes.

A. I am talking about what Mr. McLaughlin told me direct.

Q. You say Mr. McLaughlin told you to go ahead and move the doors on behalf of Interstate Lumber Sales or Mr. Whitehouse? A. Yes. [92]

Q. And you continued to talk with Miss Meyer and send information to her and rely on her to pass it on and to deal with Interstate Lumber Sales. Were you then considering her as the agent of Interstate Lumber Sales?

A. You see, as far as considering who was whose agent never entered my mind. I was making an effort to be as cooperative as possible under an extremely unsatisfactory set of circumstances brought about through no fault of my own, and it was suggested to me by Mr. McLaughlin that I make an effort to——

The Court: Whose agent do you think she was?

(Testimony of Cecil Barger.)

Mr. Darling: If she was an agent.

The Court: She put "Agent" on her letterhead.

Mr. Darling: Our position would be——

The Court: I didn't ask the question I intended. Whose agent do you think she thought she was?

Mr. Darling: If anybody's, Mr. Barger's, the plaintiff in this case.

The Court: Well, that is their theory.

Mr. Darling: That is their theory, but he is adopting a position with reference to all of these matters that she had no connection with them, no agency.

The Court: What explanation do you have of putting "Agent" on there? I never saw that before.

Mr. Darling: We have no explanation. As a matter of fact, it is such an unusual thing that our witnesses will testify they [93] never even noticed it because they had dealings before and dealings after and never was the word "Agent"——

The Court: How many documents did she put "Agent" on? I have seen one.

Mr. Darling: That is the only document in which she said "Agent" within the knowledge of ourselves.

The Court: How many documents in this transaction did she put the word "Agent" on?

Mr. Darling: One.

The Court: What is that?

Mr. Darling: That is the purchase order which confirmed the actual oral order which had been given over the phone.

(Testimony of Cecil Barger.)

The Court: Purchase order addressed to whom?

Mr. Darling: Addressed to Austin Dodds, Interstate Lumber Sales.

The Court: Is Ruth Meyer supposed to be dead, Mr. Prendergast?

Mr. Prendergast: Your Honor, you probably read in the press the other day——

The Court: I am asking if she is supposed to be dead.

Mr. Prendergast: The Circuit Court of the State of Oregon says under the statute she is an absentee and are considering her to be dead in the presence of dire peril. That is all they know. The U. S. Army Air Forces says the plane has crashed eleven miles north of Shasta and two miles east of the highway, [94] and that is all.

The Court: Whom was she flying with?

Mr. Prendergast: She was flying with a P. D. Starr. They flew to Salem and gassed up, took off from Salem intending to stop at Klamath Falls, Sacramento, Oakland and Southgate, California,—that is Los Angeles.

The Court: A business trip?

Mr. Prendergast: A business trip, yes. The P. D. Starr Lumber Company had the same situation on it and took her down there for the purpose of straightening out fifteen cars of material they had bought through her here in Portland, and she left here for that purpose and nobody has seen or heard from her since. The P. D. Starr Lumber Company is in the hands of a receiver in Los Angeles.

(Testimony of Cecil Barger.)

The Court: All right.

Q. (By Mr. Darling): You say that following July, between July and September, you made some efforts to sell these doors. What did those efforts consist of?

A. They consisted of offering to our trade; that is, the retail lumber dealers that we contacted, offering these doors we presumed in behalf of the gentlemen that still owned them.

Q. Did you rent a warehouse in another city or another locality? A. No.

Q. Did you hire anybody in another locality?

A. Well, our salesmen—one is in Durham and there is one in [95] Statesville—that travel the State generally and regularly, they were instructed to offer these doors at our cost minus the presumable allowance that we were going to receive which would, if they had sold any, would have let us out whole; in other words, we would have recovered for the owner the full amount that he had in the doors in view of this proposed settlement. It was done in an effort to further the cause of the shipper.

Q. You did that in response to Ruth Meyer's suggestion to go ahead and try to sell them?

A. We presumed on further urging from Interstate, since Mr. McLaughlin had first urged us to, we presumed that he had also urged Ruth to have us continue our efforts.

Q. So you were really doing it on reliance on what Ruth told you, based on the assumption or

(Testimony of Cecil Barger.)

presumption, as you say, that Ruth Meyer had been told to tell you that?

A. Well, only indirectly. We did it on the basis of the assumption—she stated that we should continue to try on the basis,—but the fact that we did was based on the fact that Mr. McLaughlin had originally suggested that we do it and that we saw that it could possibly be no harm to the shipper.

Q. In that original oral, in that phone conversation that you mentioned some time back in January?

A. No, there is no written instructions.

Q. Is that what you were relying on? [96]

A. There were no written instructions, no written instructions.

The Court: The shipper was Grant in California?

A. Well, we didn't know that at the time. We were considering Mr. Dodds, Austin Dodds, this other outfit, as the shipper.

Q. (By Mr. Darling): Would there be any more reason for you to assume that Austin Dodds was liable to you than there would be for you to assume Ruth Meyer was liable?

Mr. Prendergast: If the Court please, I object to the question.

The Court: Sustained.

Q. (By Mr. Darling): You did know after the receipt of this letter of June 25 that the defendants in this case had gone down and made a settle-

(Testimony of Cecil Barger.)

ment as far as they could make it with the manufacturer, didn't you?

A. They stated in their letter they had. Of course, I had no way of knowing what they had done. Maybe it was true; maybe not.

Q. Then you had sold 70-some doors to this contractor? A. I had sold the entire car.

Q. I mean, you left 70-some doors?

A. One person.

The Court: Wind this up. You said you only had one more question.

Mr. Darling: All right. Excuse me.

The Court: Do you have any redirect? [97]

* * *

Mr. Darling: Call Mr. Forrest Hayworth. [103]

FORREST HAYWORTH

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Darling:

Q. Your name is Forrest Hayworth?

A. Right.

Q. And by whom are you employed?

A. Booth-Kelly Lumber Company.

Q. How long have you been in their employ?

A. Oh, been with them since '31.

Q. How many years have you been in the lumber business? A. Since 1908.

(Testimony of Forrest Hayworth.)

Q. During that time have you become acquainted with wholesale lumber dealers as they operate in this area? A. Yes, sir.

Q. Do you know the usages and customs of the wholesale lumber dealers' business?

A. I have my idea of it.

Q. You gained that from your experience, your own personal experience in the lumber business?

A. That is right.

Q. What is the meaning of a wholesale lumber dealer under the usages and customs of the trade as you know it?

Mr. Prendergast: If the Court please, I object to that as [104] incompetent, irrelevant and wholly immaterial to any issue in this case.

The Court: He may answer.

A. Will you repeat the question?

(Last question read.)

A. Well, a wholesaler as it works here in the Northwest is a man or a firm in the business of buying and selling lumber and other wood products such as piling, shingles and that sort of thing. From my angle, selling them, he has to be a man that has some financial stability so that I have some expectation of getting my money after I ship it. Does that answer your question?

Q. (By Mr. Darling): Now, is there any such term in the lumber business as a "lumber broker"?

A. Yes.

(Testimony of Forrest Hayworth.)

Q. What is the distinction, if you know, according to the usages and custom?

A. Well, I hear wholesalers and brokers in the same firm being called wholesalers and brokers.

Q. A distinction in the nature of the way they perform their business?

A. Not to my knowledge.

Q. Now, is there any use of the term "commission man"?

A. Yes, sir.

Q. Is there any distinction between that and a wholesale lumber [105] dealer as you know the term under the usages of the trade?

A. Well, a wholesaler buys lumber for himself. A commission man buys lumber for somebody else or sells it for somebody else.

Mr. Darling: That is all.

Cross-Examination

By Mr. Prendergast:

Q. A wholesaler then would have a stock of merchandise?

A. No.

Q. He buys it for himself and hasn't sold it; what would he do with it?

A. He puts it in transit and sells it in transit.

Q. Suppose he doesn't sell it in transit; it would be his property?

A. His property as far as I am concerned.

Q. Then you say a wholesaler in the lumber business in the Northwest would not have yards?

A. I wouldn't say.

(Testimony of Forrest Hayworth.)

Q. Would you say that? A. No.

Q. Some of them do have yards?

A. That is right.

Q. So a lumber company that holds itself out as a wholesaler and buying for themselves would have a stock of merchandise, would they not? [106]

A. Sometimes. Most of them do not, however.

Q. And a person who has an office with telephone and teletype and no yard or anything is called what in the lumber business? A. Wholesaler.

Q. Called a wholesaler? A. Yes.

Q. Called the same thing; there is no difference? A. That is right.

Q. And the only difference between a commission man and a broker or wholesaler is that the wholesaler has financial stability?

A. Well, not exactly.

Q. Well, that is what you said on direct examination.

A. No. I said the commission man buys for someone else, the wholesaler buys for himself.

Q. All right, now; the commission man doesn't have any financial stability then?

A. He might have.

Q. Well, you said in looking to a wholesaler you would look to see whether he had financial stability to find out whether he was a wholesaler or not.

A. No. I said I looked at the financial stability standpoint in order to be sure I get my money.

Q. Now, do all commission men disclose the sources of their supplies? [107]

(Testimony of Forrest Hayworth.)

A. How is that?

Q. Do all commission men disclose the source of their purchases at all times?

A. Well, we sometimes sell through commission men, and in that event we invoice the commission man's customer and pay the commission man after we are paid.

Q. I am not asking you that; I am asking the general practice.

A. That is my practice.

Q. You don't know the practice of others?

A. I have been at it for a good many years.

Q. All right; we will take one of these offices in the Dekum Building, Davis Building, Henry Building, that have on the door "Lumber Broker" and they send out on the teletype an offering to 300 customers. We have one carload of dimension fir green offered for sale at so much per thousand and give the dimensions. Now, what are they; are they brokers or wholesalers?

A. From your statement there I couldn't decide which he is. He might be either one.

Q. That is right. As a matter of fact, that is the way most of them did business during the war years; they made an offering to everyone that they have available and two or three brokers might offer the same material, isn't that a fact?

A. I couldn't say.

Q. You know that as a fact?

A. Well, I doubt that. [108]

Q. Did you ever have any business with Ruth

(Testimony of Forrest Hayworth.)

Meyer? A. No, sir.

Q. Did you ever know her?

A. I don't think so.

Q. Do you have a yard?

A. We have sawmills only.

Q. You have no yards? A. No.

Q. So you just saw. Now, how do you sell?

A. We sell to wholesalers and retailers and industrials.

Q. Do you sell through commission men at all?

A. Yes, sir.

Q. And where are your sawmills?

A. One is at Springfield, Oregon, and one is at Row River, Oregon.

Q. Did you ever sell to the Austin Dodds Lumber Company? A. We have.

Q. And in that particular case you sold right to the Austin Dodds Lumber Company?

A. Right.

Q. They were not commission men?

A. No.

Q. They were actual wholesalers; they sold——

A. Yes.

Q. They have a yard? [109]

A. I don't know whether they have a yard. I doubt that.

Q. You are sure they never had lumber in storage?

A. I didn't say that. I say I never knew of a yard.

(Testimony of Forrest Hayworth.)

Q. Do you know Austin Dodds? A. Yes.

Q. Do you do business with Whitehouse, now Interstate Lumber Sales? A. Occasionally.

Q. How recently?

A. Probably within the last year.

Mr. Prendergast: That is all.

The Court: Call another witness.

(Witness excused.)

Mr. Darling: Call Mr. Brackensick.

The Court: You can give me all the definitions you want to. Just go to an old NRA code and try to figure out a label and you will get about the same place you are with me to justify a definition. Or, better, get the OPA regulations which sought to define who was a broker and who was a wholesaler. [110]

R. H. BRACKENSICK

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Darling:

Q. Your name is R. H. Brackensick?

A. Yes, sir.

Q. And what is your business?

A. I am in the lumber business.

Q. And, just definitely, particularly, more particularly what branch of the lumber business?

(Testimony of R. H. Brackensick.)

A. I am in both the wholesale and the retail at the present time.

Q. Now, have you been in the wholesaling of lumber, doors, including doors primarily? In other words, what I am saying is, is this retail a recent addition? A. What was the last part?

Q. Was the retail business a recent addition to your business?

A. Yes, sir, more so than it had been previous to the beginning of this year.

Q. How long have you been in the wholesaling of lumber and doors?

A. Well, since about the beginning of 1946.

Q. In what area?

A. In Vancouver, Washington. [111]

Q. Now, in the year 1947 what was the approximate extent of wholesaling business that you did in lumber and doors in the amount of money?

A. Well, that would include lumber, doors and plywood, principally doors and plywood, and I'd say in 1947 approximately a half a million dollars.

Q. And in 1948?

A. Approximately \$250,000, a quarter of a million.

Q. That is the volume of the business that you transacted? A. That is right.

Q. Was that principally plywood and doors, also?

A. Yes, principally plywood and doors. There are some lumber items in there.

(Testimony of R. H. Brackensick.)

Q. Now, just tell the Court how you conducted this wholesaling business with reference to whether you buy outright and sell or how you do it.

Mr. Prendergast: If the Court please, I object as it is incompetent, immaterial and——

The Court: I don't see your point. Admitted subject to objection. Go ahead and tell how you run the business.

A. I bought merchandise in either carload or truckload quantities from jobbers, wholesalers or manufacturers.

The Court: Bought it wherever you could get it, didn't you?

A. That is right, wherever possible to obtain it. And at times I shipped cars direct from the mills and at times I loaded cars, [112] gathering the merchandise from various points. I assumed the liability, paid for the cars and sold them to either brokers, commission men, wholesalers or directly to the firms that made requests for those particular items of merchandise.

Q. (By Mr. Darling): Would you know the nature of the person you sold it to at the time you sold them?

A. Would I know the nature——

Q. Whether they were wholesalers or commission men?

A. Not necessarily.

Q. Did you ever deal with Ruth Meyer; did you know her?

A. Yes.

Q. Do you know the nature of the business that she conducted?

(Testimony of R. H. Brackensick.)

A. Well, she, so far as I was concerned, she paid me for what she purchased from me and I wasn't particularly interested whom she sold it to.

Q. Did you ever see the word "Agent" on any of the purchase orders that you received from her?

A. No, sir, I did not.

Q. Do you know whether or not any of the doors or other material that you sold to her ever went to Barger Millwork? A. Yes, sir, I do.

Q. In other words, were there one or more than such transactions during the years '47 and '48?

A. Within the two years I would say there were more than one.

Q. In other words, you knew that Barger was one of Meyer's [113] customers? A. Yes, sir.

Q. Now, during the time of your being engaged in this business did you keep acquainted with the market prices for doors?

A. Yes, sir, very definitely.

Q. Do you know what an F-82 door is?

A. Yes, sir.

Q. Does it have certain standard specifications set down by the Fir Door Institute?

A. Yes, sir.

Q. Now, did you ever deal in any doors that were not F-82 doors? A. Yes, sir.

Q. Would you tell us the condition of the market in January of 1948 with reference to whether doors were scarce, hard to get, the type of doors that were on the market?

(Testimony of R. H. Brackensick.)

A. Doors were very scarce and very difficult to obtain all during 1947 and approximately for the first three months of 1948. What else was there to the question?

Q. Pardon me just a minute. Now, with reference—when I mentioned the word “market,” what market were you thinking of? What is “market” within your meaning?

A. Well, market can be both the buyer’s market and the seller’s market.

Q. Where did you sell doors to, what portions of the United States did your doors go to? [114]

A. Oh, I sold doors to various individuals in Portland and Seattle and Pennsylvania and New Jersey.

The Court: Wait a minute. What is your position about these doors? What is the dispute, that they are not F-82 doors?

Mr. Darling: We don’t know; we never had a chance to look at them. That is part of our contention. If they had dealt with us directly and we had been a seller——

The Court: Did you sell them to Ruth Meyer for F-82 doors?

Mr. Darling: We assumed so.

The Court: Did you buy them from Grant as F-82 doors.

Mr. Darling: Yes.

Q. Now, were you familiar with the prices of doors which were not F-82 doors in the period of January and February of 1948?

(Testimony of R. H. Brackensick.)

A. Well, I had never been definitely confronted with that particular condition that I can remember.

Q. Did you ever sell any doors that were not F-82 doors? A. Yes, sir.

Q. I hand you Plaintiff's Exhibit 9, which is a photograph, purporting to be of two doors, and the one on the left has been testified to as being one that would be a standard F-82 door. Would you consider that as being an F-82 door?

A. It could be. It looks like the top panel is slightly long, according to the picture. I don't know. It may be just a case of the photograph.

Q. Now, looking at the door at the right of the picture, would [115] that be considered an F-82 door?

A. Well, it wouldn't be according to the terms of the Fir Door Institute, according to the specifications. It is a two-panel door.

Q. Now, you will notice there is a break in the lower panel on the right-hand door.

A. Yes, sir.

Q. Now, it's been testified to here by the plaintiff that he would assume that the other doors in this carload that we are concerned with did not have that crack in the panel, so the question that I am going to ask you, if you can ignore the crack in the panel and consider that lower panel to be one that is not cracked—Now, did you ever see a door similar to the door on the right?

A. I have seen doors of almost any type and

(Testimony of R. H. Brackensick.)

description that were sold during 1947 and 1948. So far as I can say, I may not have seen one exactly like it, but I have seen similar.

Q. Is there enough in this picture of the door on the right for you to state whether or not there would have been any demand for that type of door in January and February in 1948?

Mr. Prendergast: If it please the Court, Counsel will have to qualify that by saying in North Carolina, because that is where they are.

The Court: That is right.

Mr. Prendergast: You will have to ask about the market in [116] North Carolina.

A. I wouldn't know.

Q. (By Mr. Darling): Would you know about the market on the Atlantic seaboard?

A. Yes, to a certain extent.

Q. You have sold doors, as you say, in New Jersey. Sell doors in any southern states?

A. Yes.

Q. Now, then, with reference to the door on the right, do you have any opinion as to what the market price from your standpoint as a wholesaler would have been of a door similar in character to the door on the right without that cracked lower panel?

Mr. Prendergast: If the Court please, I trust that Counsel will qualify that question before it is answered. I object to it in its present form.

The Court: Hurry along now. I think he wants

(Testimony of R. H. Brackensick.)

to know if you sold that kind of a door on the Atlantic seaboard.

A. Whether I sold that type of door on the Atlantic seaboard? No, I wouldn't say I had sold that particular type.

Q. (By Mr. Darling): Well, from your general knowledge of the wholesaling business and the amount of work that you had done in the door business and your knowledge of the market and the demand for doors in January and February, what would be your expert opinion as to whether or not there would be a market for that type of a door in January and February of 1948? [117]

The Court: On the Atlantic seaboard.

Q. (By Mr. Darling): On the Atlantic seaboard?

A. I should say that up until, oh, the second quarter of 1948 that there was a market for almost any kind of a door that could have been obtained.

The Court: Including that type of door?

A. Yes, sir.

The Court: That answers your question.

Q. (By Mr. Darling): Now, with reference to that market do you have an opinion, based upon your information and experience in this business, as to what the price would be that you as a wholesaler would receive for that type of door as compared with the price you would receive for an F-82 standard door?

(Testimony of R. H. Brackensick.)

Mr. Prendergast: I am objecting to this as pure speculation.

The Court: He may answer. Overruled. What price could you have gotten for it in the first quarter of '48?

A. For a door——

The Court: Compared to the F-82.

A. Well, that is questionable, your Honor. It depends upon the scarcity of the particular buyer, his need for doors in a particular housing area.

The Court: I know what it depends upon. Can you give me a figure?

A. Yes, sir.

The Court: What figure? [118]

A. I can give you a figure of a F-82 door, a one-panel door; the price of the two-panel door was 10 cents higher than a one-panel door, and the price range was somewhere between \$7.50 and \$8.50. Now, what the particular type of door on the right which has the lock rail in the center of the door rather than placed lower would have been worth with respect to the two different doors, that depends entirely upon what the necessity was for supplying a particular job area.

Q. (By Mr. Darling): Now, with reference to the market, say, from in January and February up to the first of March, did the market and demand for doors stay about the same?

A. Up until when?

Q. Through January up until March.

(Testimony of R. H. Brackensick.)

A. I should say through January and February up until, oh, approximately the end of March the door market as far as I or we were concerned was approximately the same.

Q. What happened between that time and the end of that time and June or July?

A. The market fell off considerably.

Q. And what happened to the market for doors between July and September?

A. It became very, very slow, very bad, the demand fell off.

Q. And what happened to the market from September on? A. From September of 1948?

Q. Yes. [119]

A. Well, it was pretty bum.

Q. Is it still that way today?

A. Yes, sir. I have some doors I would like to sell.

The Court: Very encouraging. Cross-examine.

Cross-Examination

By Mr. Prendergast:

Q. When you speak of Atlantic Coast, there is quite a difference in the population center of New York and Philadelphia and the salvage areas and in North and South Carolina; in other words, it is easier to sell a cull door in a city like Philadelphia and New York than in a city of 10,000 in South Carolina or North Carolina?

A. I wouldn't necessarily say so. It would de-

(Testimony of R. H. Brackensick.)

pend entirely where the purchaser had an idea of placing the merchandise. Somebody in North Dakota might buy doors and sell them in Florida.

Q. But your probability is greater with the size of the population?

A. Oh, your possibilities are greater; yes, sir.

Q. The lumber market had a lot to do with the areas of large construction, that you could palm off any kind of a door at that time in areas of large construction like Grand Coulee when it was building, and other places where they needed lots of doors and there were no doors, they would take anything?

A. I would say there were some awfully bum doors that went to [120] California.

Q. As a matter of fact, when you sold your doors you sold them under the Fir Door Institute grade, did you not?

A. Sometimes, and sometimes not.

Q. But you never sold any door under the Fir Door Institute grade and delivered something else, did you? A. No, sir.

Q. Did you have a yard in Vancouver?

A. Yes, sir.

Q. And in the lumber business you dealt with anybody that wanted doors? A. Generally.

Q. Now, this half-million dollars worth of business, probably 80 or 90 per cent of that was on plywood, wasn't it?

A. No, I wouldn't say so.

(Testimony of R. H. Brackensick.)

Q. As a matter of fact, there was lots of plywood at a high price and very few doors in 1948?

A. We obtained quite a few doors.

Q. But would you say that most of your business was in plywood?

A. Well, now, I wouldn't definitely—but, I wouldn't say most of it; no, sir.

Q. Before you came here to testify, did you check up to see if you had sold some doors to Barger through Ruth Meyer?

A. Yes, sir.

Q. And what was the source of those doors?

A. Where was the source of them?

Q. Yes.

A. Well, if I recall, there was one car that was secured direct from the manufacturer.

Q. Who was that?

A. Acme Door Company.

Q. Acme Door Company?

A. Yes.

Q. Now, was that after January or before January of 1948?

A. I'd say that was before January of 1948.

Q. And where was the other one? Any cars from Robinson?

A. No, sir. I think there was a car that was secured from—well, I think they originally came from M & M.

Q. Did you ever ship any doors to Barger through Ruth Meyer that were not fir doors?

A. Now, that I wouldn't definitely know. It is possible there may have been some spruce and hemlock in the construction of some of the doors.

(Testimony of R. H. Brackensick.)

Q. But you don't know?

A. I don't know definitely.

Q. But any fir doors that you shipped you shipped under the Fir Door Institute standards; in other words, using their descriptions and standards?

A. Generally so, yes. If they were F-82 doors, they were under the standards. [122]

Q. From the picture you have in your hand could you tell the grade of the door on the right? Notice the grain and stile, is that Grade A or B?

A. Well, I'd say that the door could be B or C.

Q. As a matter of fact, the Fir Door Institute says there is nothing but vertical grain and stiles in a Grade B, does it not?

A. That I wouldn't know, sir.

Q. You are not familiar with the grade in the Fir Door Institute?

A. I am to a certain extent but not too familiar so that I would be able to make that statement.

Mr. Prendergast: That is all.

Redirect Examination

By Mr. Darling:

Q. Was there a correlation that you know of between the lumber market as a whole and the time between January and September of 1948, and the door market as far as whether it was going down?

The Court: He means, did they both go down together.

A. In 1948?

(Testimony of R. H. Brackensick.)

Q. (By Mr. Darling): Yes.

A. Between what months?

Q. Between January and September.

A. Of 1948. Yes, I would say that there was a variation in the ability to purchase better grades of lumber at a more reasonable price and that the same was true about doors.

The Court: All right. Put another short witness on before [123] we recess, if you have one.

(Witness excused.)

Mr. Darling: Call Mr. Lytle.

FRANCIS A. LYTLE

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Darling:

Q. Your name is F. A. Lytle? A. Yes.

Q. Ordinarily known as Al Lytle?

A. That is right.

Q. What is your present business and occupation?

A. A buyer, strictly, for Interstate Lumber Sales.

Q. In other words, you are employed by Interstate Lumber Sales, the corporation?

A. That is right.

Q. Now, in January of 1948 were you an em-

(Testimony of Francis A. Lytle.)

ployee of Interstate Lumber Sales—Withdraw that question.

In January of 1948 were you an employee of Mr. Whitehouse doing business as Interstate Lumber Sales?

A. Well, I wouldn't say as an employee.

Q. What was your connection then? [124]

A. Strictly the location of lumber, you might call, on a finder's fee or a commission.

Q. Would you speak louder so we can hear it down here? As I understood, you said you were what is called a finder, you were finding lumber for a commission? A. That is right.

Q. You didn't receive any salary?

A. No, sir.

Q. Did you find lumber for more people than Interstate Sales? A. No, sir.

Q. You were exclusively working for them?

A. Yes, sir.

Q. But your entire reward or remuneration was on a commission basis, is that it? A. Yes, sir.

Q. Now, what was the condition of the market in the early part of January or throughout January in so far as the availability of doors?

The Court: What is the point?

Mr. Darling: On the availability of them.

The Court: This whole thing of market, what has this to do with it?

Mr. Darling: We think it has a real thing to do with it, because as we see the picture during the

(Testimony of Francis A. Lytle.)

time that the doors were scarce and it looked like there was a sale there was no rescission [125] or attempted rescission by Mr. Barger, as our testimony will show, but the efforts towards rescission came when the market was out, the bottom dropped out, and found themselves with a carload of doors, and if we had had definite notice of rescission back in January when they say that they gave it to use we could have disposed of the doors.

The Court: Well, do you mean you are going to dispute the testimony about the telephone conversation?

Mr. Darling: Very definitely.

The Court: And the first letter is dated what?

Mr. Darling: The first letter we consider says he rescinded this contract is September, 1948.

The Court: What is the first letter objecting to the doors?

Mr. Darling: The first letter we have directly from him I believe was in March, the 9th, of 1948.

The Court: When did he get his doors?

Mr. Darling: He got the doors on January 27 of 1948.

The Court: When does he say he had this telephone call from your man McLaughlin?

Mr. Darling: He would say sometime after February 4th.

The Court: Are you going to deny that conversation?

Mr. Darling: We will admit there was a con-

(Testimony of Francis A. Lytle.)

versation and have testimony as to what occurred.

The Court: Are you going to admit your man called him?

Mr. Darling: Yes. [126]

The Court: All right; go ahead.

Q. (By Mr. Darling): The question I asked you is what was the situation of the door market in so far as availability of doors in January of 1948.

A. Well, doors were very hard to secure from any market and it was just practically an impossibility. You just located doors anywhere you could get doors and you put in a lot of time trying to find doors. Doors were very, very scarce.

Q. Now, you have heard us talking, you know what carload of doors we are concerned with in this case?

A. Yes, sir.

Q. Now, were you acquainted with Ruth Meyer?

A. Yes, sir.

Q. Well, will you just tell the Court what the facts were as you know them as far as this particular carload of doors. Let me introduce it by saying, are you the one that found this particular carload of doors?

A. I am.

Q. All right; now, tell the Court concerning the transaction with Ruth Meyer.

A. Ruth Meyer called the morning of the 10th and asked if we had any doors, if I had any doors, or any material to offer, or had located any, and I told her I had been offered the previous day this carload of doors and gave her the description,

(Testimony of Francis A. Lytle.)

amount, and told her it was subject to prior sale, and she said, well, [127] she would see if she could find a customer and call me back.

Q. Did she call you back?

A. I left and I went back out in the field. She had called back my wife.

Q. Now, what position does your wife play in your business?

A. As secretary, she takes care of all phone calls and everything when I am not there.

Q. Does she make any memorandum of those phone calls? A. Yes.

Q. Now, then, what did you then next do when you found out she wanted the doors?

A. On my return I called her and told her—in the meantime, the next morning we had a letter saying she would accept the doors, she had a market for them. I had called, informed the Eugene office relative to the doors and that she wished the doors, and they sent a copy of, she sent a copy of her invoice to me and one to the Eugene office, a purchase order for this car of doors.

Q. Now, on that purchase order did you notice whether or not it had the name “Agent” typewritten under her name?

A. I did not at that time.

Q. Had you ever had any prior dealing with Ruth Meyer? A. Yes.

Q. And was she listed on her stationery and purchase orders as a wholesale lumber dealer? [128]

A. Yes.

(Testimony of Francis A. Lytle.)

Q. And had you ever seen the name "Agent" on any of these correspondence or purchase orders?

A. No, I hadn't.

Q. Had you ever had any dealings with Ruth Meyer after this particular carload?

A. Yes, sir.

Q. And did you ever see that name "Agent" on any of the others? A. No, sir.

Q. When she talked to you with reference to this order did she—and gave you the oral order—did she state that she was an agent?

A. She did not.

Q. Now, what was the next information—or, just tell the Court what happened next as far as you know on this particular transaction.

A. Well, the transaction was completed as far as I knew. There was nothing more on it until I returned from a trip. My wife had taken a notation from Ruth that she had a phone conversation from Mr. Barger that——

Q. With Mr. Barger?

A. Well, she said from her customer.

Q. You mean Ruth Meyer said?

A. Ruth Meyer. A complaint on the car of doors, that they were B and C doors, that they were not A and B doors, and that she [129] wished, her customer wished an adjustment on the car of doors.

Q. Now, did your wife make a memorandum as far as you know of that particular conversation?

A. Yes, sir.

(Testimony of Francis A. Lytle.)

Q. She is here available for testimony?

A. Yes, sir.

Q. She will be able to testify as to the way she made that memorandum? A. Yes, sir.

The Court: Where is your office?

A. At my home.

The Court: Portland?

A. Yes, sir.

The Court: How long had you known Ruth Meyer?

A. From July, 1947.

The Court: How long had she been in the lumber business, do you know?

A. I don't know, but previous to that she had a partner in another name.

The Court: In the lumber business?

A. Yes, sir.

The Court: Here in Portland?

A. Yes, sir.

The Court: She an unmarried woman?

A. I think so. [130]

The Court: Is that her unmarried name, Ruth Meyer?

A. Yes.

The Court: Do you know what previous experience in the lumber business she had?

A. No, I do not.

The Court: How old a woman was she?

A. Oh, I would say thirty-three or thirty-four.

The Court: Do you know about what volume of

(Testimony of Francis A. Lytle.)

business she did when she went in for herself?
Were you ever around her office?

A. I was around her office on several occasions.
She seemed to do considerable business.

The Court: What building was her office in?

A. In the Davis Building.

The Court: Where is that?

Mr. Prendergast: The building is the old building on Third & Stark, across from the liquor store there.

The Court: Oh, I see.

Q. (By Mr. Darling): Did you have any further conversations later with reference to this particular transaction, this complaint? Tell the Judge what further conversation you had with Meyer.

A. On several occasions after that Ruth and I discussed the claim, and she asked me if I thought the original claim of 40 cents a door was too much due to the delay we were having in [131] getting a settlement from the door manufacturer.

Q. Now, you say the original claim of 40 cents a door. What do you mean by that?

A. That is the claim that she asked for in her first, original conversation with my wife.

Q. Did she ever tell you as to whether or not Barger felt that that was the proper settlement?

A. She did.

Q. What did she say?

A. Well, she thought that 40 cents would be a legitimate claim.

(Testimony of Francis A. Lytle.)

Q. She thought, but did she tell you that Barger told her that?

A. Yes, sir, her customer.

Q. And was that a face-to-face conversation?

A. Yes, sir.

Q. Well, now, when she asked you whether 40 cents, whether you thought 40 cents was too much, what did you say to her? I didn't get that.

A. Well, I told her I wasn't sure whether it would be a legitimate claim or wasn't. I had never seen the doors, but if there was a defect or grade wasn't up that 40 cents was not an unreasonable claim and if we could get more for her from the door manufacturer and what we would contribute and what she would contribute we would do everything for her customer we could.

Mr. Darling: That is all. You may cross-examine. [132]

Cross-Examination

By Mr. Prendergast:

Q. You are the F. A. Lytle who was Vice-President of the Interstate Lumber Sales Company, are you not? A. Yes, sir.

Q. And you were in the process of organization of the Interstate Lumber Sales, Inc., in February of 1948, were you not, about the time of this transaction; Whitehouse had bought out the interest of Dodds and was incorporating? You had put in, you owned 50 shares of the capital stock of the company and you did that in January of 1948, didn't you?

(Testimony of Francis A. Lytle.)

A. Either February or March. I wouldn't say that.

The Court: We will take a short recess.

(Short recess.)

The Court: Finish this up.

Q. (By Mr. Prendergast): As I understand, Mr. Lytle, you testified you are what is known as as finder for Interstate Lumber Sales in 1948, is that right?

A. No. The Austin Dodds Lumber Company at that time.

Q. It was Austin Dodds Lumber Company at that time. You had worked for Austin Dodds for more than a year, had you not, prior to that time?

A. I started in '47, yes.

Q. And so in January it was still Austin Dodds but was being transferred to Mr. Whitehouse. And in February you started [133] organizing the Interstate Lumber Sales, Inc. You subscribed to 50 shares of capital stock and were nominated as Vice-President of the company. That was concurrent with this transaction, was it not?

A. No, sir. That was in March, April when we incorporated.

Q. The Articles of Incorporation, the charter was finally granted in April? A. April 1st.

Q. Now, your testimony was that on January 10th of 1948 Ruth Meyer called you in Portland at your home. A. That is right.

Q. And you are sure of that day?

(Testimony of Francis A. Lytle.)

A. Yes, sir.

Q. And asked you if you had any doors?

A. Yes, sir.

Q. You knew Ruth Meyer at that time and had known her some time and had been in her office in the Davis Building? A. Yes, sir.

Q. Her office in the Davis Building consisted of one room with a number of telephones in it, did it not? A. It consisted of two rooms.

Q. Well, there was an entrance as you come in the door, a glass partition, and you go into the other room and there was a desk where the stenographer sat?

A. Office girl in the first office. [134]

Q. And you had been up there a number of times, had sold her, through her, merchandise before, had you not? A. Yes, sir.

Q. And, as a matter of fact, some three weeks before that you had sold her a car that Austin Dodds had from Robinson Company?

A. Well, there were several cars previous to this, just previous to this one.

Q. F-82 doors manufactured by Robinson Company, sold by Austin Dodds through you and through Ruth Meyer to the Barger Lumber Company?

A. I wouldn't say they were Robinson's doors, no.

Q. But you remember selling a car of doors?

A. They came from Washington through an-

(Testimony of Francis A. Lytle.)

other wholesaler and we would have no way of knowing.

Q. But that was three weeks before this transaction in January?

A. Shortly before this transaction.

Q. All right; now, when Ruth called you you told her that you had at that time, on January 10th, you had another car of F-82 doors, did you not?

A. That is right.

Q. And you gave her a price on them?

A. Yes.

Q. You gave her the specifications of the car?

A. As they were given to us, as they are on the order.

Q. You had them right there, one thousand "2.8 x 6.8's" and [135] four hundred "2.0 x 6.8's" and one hundred "2.6 x 6.8's" two-panel F-82 doors. That is what you told her was in the car?

A. That is right.

Q. And she said that she would see what she could do with them?

A. That is right.

Q. And you called your Eugene office then; that is Austin Dodds Company, isn't it?

A. That is right.

Q. And you called them and in the meantime Ruth had called your wife back on the 11th of January and said she had placed that car, had a customer for that car?

A. It was either on the 10th or the 11th.

Q. Either the 10th or the 11th she told your wife

(Testimony of Francis A. Lytle.)

that so you called your Eugene office then and told them about that and they said they had received an order from her for it.

A. I won't say, recall back that they said they had an order from her at that time.

Q. Well, what did you tell the Eugene office?

A. Well, relative to other material that I had picked up in the field or located. There was conversation sometimes every day, and sometimes we would miss three or four days.

Q. At this conversation, after your wife called, Miss Meyer called and said she had a customer for this car, and you called your Eugene office—now, what was said to your Eugene office about this call?

A. I might have called the Eugene office relative to whether they had done anything with it or other material.

Q. You said you did call them about this car. I don't know what you called them about. What did you call them about? Did you tell them Ruth Meyer had a customer for this car, had placed an order with you?

A. She hadn't placed an order, no.

Q. Did she place the order with you at any time, Mr. Lytle, or did she place it with the Eugene office?

A. She placed it with the Eugene office. I had a copy of it.

Q. You got a copy back. That is dated January the 12th and is Plaintiff's Exhibit 3. And you got a copy of the confirmation of that order and acceptance by J. H. Hendrickson, Austin Dodds Lumber Com-

(Testimony of Francis A. Lytle.)

pany, dated January 14th, confirming the fact that they had accepted this order for the car to be shipped to the Barger Millworks? A. I believe so.

Q. Now, you knew the Barger Millwork Company because a car had been shipped to them before, didn't you?

A. We had shipped several cars to them before. I presumed this was going to the same place.

Q. And Ruth told you this car was *going the* same place?

A. No, she didn't. She referred to her customer, not Barger Millwork, when we were discussing this order.

Q. On the 12th of the month you got a copy of her order saying [137] it was going there?

A. No. At the time it was offered to her she didn't know who she was going to——

Q. Did I misunderstand you to say she was your agent to sell that car? A. No, sir.

Q. Did Ruth Meyer have any lumber yard that you know of? A. Not to my knowledge.

Q. As a matter of fact, her entire place of business was the office in the Davis Building, wasn't it?

A. That is right.

Q. I am handing you Plaintiff's Exhibits 2 and 3, which is the order and acceptance of the order. Now, when did you first see that order from Ruth Meyer?

A. Well, it would have been the following day or the day after when it would come to me.

(Testimony of Francis A. Lytle.)

Q. All right; now, is it your testimony that the word "Agent" was not on there at the time, or did you just testify that you didn't see it?

A. I didn't see it.

Q. You wouldn't say it wasn't on there?

A. I wouldn't say it wasn't on there.

Q. As a matter of fact, that has been in your possession ever since, or possession of the Austin Dodds Company, until it was produced on my demand this morning in open court, is that right?

A. That is right.

Q. Now, you went away, then. This was on the day after the 12th when the order was placed and you went away and you came back; now, you say your wife and Ruth Meyer had had some conversation?

A. Yes.

Q. What was the date of that conversation?

A. That was on the 30th, January the 30th.

Q. On the 30th? And the conversation that Ruth Meyer told your wife at that time that the complaint about the doors was that they were B and C grade and not A and B grade, and that was on the 30th of January?

A. That is right.

Q. And that was the only complaint?

A. No, no.

Q. What was the other complaint?

A. Well, that she wanted an adjustment of 40 cents a door.

Q. And that was on the 30th of January?

A. That is right.

(Testimony of Francis A. Lytle.)

Q. They wanted 40 cents a door on the 30th of January; now, you are sure of that?

A. Yes, sir.

Q. And Ruth Meyer then at that time asked you if that was a reasonable adjustment?

A. A short time after that. [139]

Q. How long after that?

A. Oh, I would say a couple of weeks afterwards.

Q. A couple of weeks afterwards?

A. Two weeks afterwards, three weeks.

Q. Now, did you have any further conversation with Mr. McLaughlin or Mr. Whitehouse about this shipment?

A. Well, from time to time to the fact that they were trying to make an adjustment with the mill.

Q. Let me ask you this, Mr. Lytle: You say on the 10th when Ruth Meyer called you up and you told her you had a car of these doors—where did you have that car of these doors?

A. This car of doors was offered to us by a man by the name of Johnson that had dealings with the door factory in Sacramento, California.

Q. Now, what did you have to show that you had that car of doors, that you could offer them for sale?

A. We didn't have anything.

Q. Didn't have anything? A. No.

Q. When did you purchase that car of doors from Johnson?

A. Johnson had no dealing in the car only that he made the statement if we could sell the doors

(Testimony of Francis A. Lytle.)

his friend—we should call Sacramento and call the door factory direct.

Q. Whom did you get your commission from?

A. Austin Dodds Lumber Company. [140]

Q. Austin Dodds Lumber Company?

A. That is right.

Q. And what did Austin Dodds Lumber Company pay for these doors? Do you have the invoice from the mill?

A. Yes—no, I don't have it here.

Q. Have you seen it?

A. Yes, I have seen it.

Q. What did they pay for these doors?

A. \$7.60, I believe.

Q. And what was the grade on that invoice?

A. A and B.

Q. What was the design? A. F-82.

Q. Is that invoice in the possession of your company now, the Interstate Lumber Sales, Inc.?

A. I don't know.

Mr. Prendergast: May I ask Counsel if they can produce that invoice?

The Court: They will look for it. Go ahead with the examination.

Q. (By Mr. Prendergast): Did you at any time go down to the mill in California, Mr. Lytle?

A. No, sir.

Q. You had nothing to do with any negotiations between Austin Dodds or Whitehouse and this mill in Sacramento? [141] A. No, sir.

(Testimony of Francis A. Lytle.)

Q. Do you know if Austin Dodds or Austin Dodds' successors, whoever they might be, had sold lumber, that is fir lumber, to this mill in Sacramento?

A. I don't know if they sold any lumber. Not to my knowledge.

Q. You don't know that? A. No.

Q. You said the first conversation you had with Ruth Meyer after placing the order was she asked for 40 cents, is that correct?

A. That is correct.

Q. And the first conversation was after you returned after she had a conversation with your wife?

A. That is right.

Q. And that was on the 30th of January?

A. My conversation wasn't the 30th of January.

Q. But your wife's conversation was?

A. Yes, that is right.

Mr. Prendergast: That is all. Before I finish with him I would like to have the invoice to question him.

The Court: He will be here. I see Mr. Patrick. Is he one of your witnesses?

Mr. Darling: Yes.

The Court: Do you want to call him now?

Mr. Darling: Mr. Patrick. [142]

C. C. PATRICK

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Darling:

Q. Mr. Patrick, what is your business?

A. Principally wholesale lumber business.

Q. How long have been engaged in that business? A. Over thirty years.

Q. And where has your office been during that time?

A. All the time in Portland, Oregon.

Q. And in the course of being engaged in this business have you sold lumber throughout the United States? A. Yes.

Q. Bought and sold lumber throughout the United States? A. Yes.

Q. Now, in this case, Mr. Patrick, first—I will withdraw that statement and ask you, during your thirty years or more of experience in the wholesale lumber business have you become acquainted and familiar with the usages and customs prevalent in this business? A. Yes.

Q. Now, in this particular case there is some question as to what the function of a wholesale lumber dealer is, and for that purpose we have asked certain people that we think can qualify [143] as experts by reason of their knowledge of usages of the business to come in and testify, and we will

(Testimony of C. C. Patrick.)

now ask you if you will tell us what a wholesale lumber dealer is and what position he plays in the lumber trade.

A. Well, as distinguished from a commission lumber salesman, a wholesale lumber dealer buys and sells whatever product he is handling for his own account. Some wholesalers have both yards and also ship direct from a mill to their customers. Others are known as direct mill shipment wholesalers and they have no yards, but in the course of a number of years' business there is very few of them that get by without having a yard of some nature with anywhere from a hundred thousand to several million feet in it.

Q. Do you have a yard? A. Yes.

Q. Now, during the years of '47 and '48 and earlier years were there a number of wholesale lumber dealers that did not have yards?

A. Yes. We did not have one in those years—yes, we did—Oh, in '47 and '48—we did not have them during the war period.

Q. How does a commission man transact his business?

A. He acts as either an agent for the producer or the customer and whichever one he acts as agent for he receives a commission from them. He does not invoice—he gets a copy of the invoice, [144] if they give it to him, to complete his records to see that his order has been filled.

Q. Now, under the usages of the trade when a

(Testimony of C. C. Patrick.)

customer buys through a commission man does the customer pay the commission man or pay the person from whom the lumber is obtained?

A. Under normal conditions the customer pays the shipper of the lumber and the commission man collects a commission from the shipper.

Mr. Darling: That is all. You may cross-examine.

Cross-Examination

By Mr. Prendergast:

Q. Now, you spoke about "under normal conditions" that is done. That would imply under abnormal conditions the other practice is followed of arranging with a bank or financial institution to handle the transaction by paying through the account of the agent.

A. Wait a minute. I don't follow you.

Q. Let me ask it this way: Isn't it a fact, Mr. Patrick, that these so-called brokers, that is people who have offices and telephones who takes orders and supply them made it a practice during the scarcity of millwork not to disclose their source of supply on scarce items like plywood, doors, and things of that nature, isn't that right?

A. I think a lot of them tried to, but if they had known how it was handled they would know they didn't disguise anything. [145] Anybody can trace a shipment if he wants to, provided he has a friend in the railroad office.

(Testimony of C. C. Patrick.)

Q. That is right. In other words, they would have to go to the trouble of going back?

A. Why, if a mill would ever disguise where it was we always trace. We want to know where it was made and what type of lumber.

Q. We are talking about millwork, not lumber.

A. That would be the same thing.

Q. And isn't it a fact that in such practice which was followed during that period of time that where a broker had no financial responsibility; that is, where they had nothing—they had an office and a telephone—that instead of——

A. Well, now, are you speaking of a broker or a wholesaler?

Q. I am speaking of a person who has an office and telephone, has no yard, and who takes, calls up some lumber company and asks them if they have any doors, and the lumber company says yes—and, now, whatever we call that——

A. I am not calling, but if he does that and doesn't finance it he is a broker and not a wholesaler. A wholesaler assumes responsibility and buys and sells and invoices it.

Q. In other words, financial responsibility has a lot to do with it if it is financed by the man himself?

A. No, it doesn't make any difference how he is financed. Let him finance himself, whatever way he can, but he assumes [146] responsibility for the order. He assumes responsibility with the customer for selling it; he then is a wholesaler.

(Testimony of C. C. Patrick.)

Q. As a matter of practice, if you were going to sell \$14,000 worth of lumber to somebody in an office in "X" building in Portland and they had only a telephone, you would check their financial responsibility or require payment before delivery, would you not?

A. Yes, or have a guarantee of payment anyhow.

Q. Now, as a matter of fact, in the lumber business it is very easy to ascertain, is it not, the financial responsibility of anybody in the lumber business through the Lumbermen's Credit Association?

A. You can get their ratings, yes. Those ratings are not always correct.

Q. But you can get any rating, they rate everybody doing any business?

A. They rate anybody they have any record of.

Q. That is correct; and, as I say, the practice not only in the lumber business but in any good business would be before you sold somebody \$14,000 worth of merchandise would be to see if they could get the \$14,000 to pay for it.

A. Well, we sell export quite frequently and don't pay any attention to the credit of the customer.

Q. That is export? A. Yes. [147]

Q. How do you protect yourself?

A. We have an irrevocable letter of credit before we accept the order.

Q. That is the same thing as credit; in other words, you demand credit from somebody that will stand good for it?

(Testimony of C. C. Patrick.)

A. We have an irrevocable letter of credit in a bank in Portland and San Francisco.

Q. That is your assurance you will get your money? A. That is our insurance, yes.

Q. That is right, your insurance that you will get the money. A. That is right.

Mr. Prendergast: That is all.

Mr. Darling: Could I ask one question?

Redirect Examination

By Mr. Darling:

Q. In the determination of financial responsibility, if you had dealt with a person listed as a wholesale lumber dealer on a number of occasions and had received your money, that would be some assurance to you that you would get your money, wouldn't it, past dealings?

A. Well, it depends what their rating was. We sell lots of customers a single car that have no rating in Dun & Bradstreet's or the Red Book, but we do have a personal knowledge of their integrity. I feel safer selling an honest man with no rating than I do a crook with a good rating. [148]

Mr. Darling: All right.

The Court: Do you want to call the lady now?

Mr. Darling: Yes, Mrs. Lytle.

(Witness excused.)

MRS. F. A. LYTLE

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Darling:

Q. Your name is Mrs. F. A. Lytle?

A. Yes.

Q. And you are the wife of the one we know as "Al" Lytle who just previously testified?

A. That is right.

Q. Now, will you state what your position was in your husband's business back in January of 1948?

A. Well, technically speaking, I don't have any position. It is just when he is away from the house I try to help him by taking all phone calls, and since I don't know anything about the lumber business I write down everything that is said because I am not a judge of whether or not it is important; so I keep a little book and write down all phone calls and he checks that book when he returns to the house. [149]

Q. As a part of established procedure of his business, then, when he is away you keep track of all phone calls and make a memorandum of what is said?

A. Yes.

Q. And you have that little book with you?

A. I have it.

(Testimony of Mrs. F. A. Lytle.)

Q. Now, did you at some time on or about January 30th, do you have any memorandum that is in connection with this particular transaction, any conversation or phone call from Ruth Meyer?

A. Just before office closing, just shortly before 5:00 o'clock on the afternoon of January 30th I had a phone call from Ruth Meyer and she said she had just talked by phone with her customer, Mr. Barger, I believe, and that he was dissatisfied with a carload of doors he had received.

Q. Do you have the memorandum that you wrote at the time? A. Yes, I have.

The Court: Show it to Mr. Prendergast. Have you seen it, Mr. Darling?

Mr. Darling: Yes, I have seen it.

Mr. Prendergast: For a matter of the record only, it is hearsay, but I recognize the situation we are in, so I don't urge it too strongly other than it is hearsay.

The Court: Go ahead, Mr. Darling.

Q. (By Mr. Darling): Now, Mrs. Lytle, will you tell us what that memorandum says that you have entered as of January 30th? [150]

A. Well, I can read it.

Q. Is it in your handwriting?

The Court: You better get at it the other way. Does she have an independent recollection——

Mr. Darling: All right.

Q. Do you have an independent recollection of what that memorandum says?

(Testimony of Mrs. F. A. Lytle.)

The Court: No. The conversation.

Q. (By Mr. Darling): Of the conversation?

A. Well, my recollection was simply that the customer was not satisfied with the contents of the car. He asked for a rebate or a refund and mentioned 40 cents as being an acceptable figure. Now, she didn't say he insisted on 40 cents; she merely mentioned 40 cents as being an acceptable figure. Now, I don't know whether that would mean for a suggestion that we should come back with a 40-cent offer——

The Court: And you wrote down right away what she said?

A. Yes.

The Court: And that is in the book?

A. Yes.

The Court: Would you like to offer the book?

Mr. Darling: We offer the book in evidence.

The Court: Admitted subject to the objection.

Mr. Darling: In view of the objection we would be willing in order to save our record to allow her testimony to go in. [151]

The Court: That is already in. It has to be marked, Mr. Clerk.

(Black notebook, so produced, was thereupon marked Defendant's Exhibit P, and was received in evidence.)

(Testimony of Mrs. F. A. Lytle.)

DEFENDANT'S EXHIBIT P

3:50 p.m. Ed Bartholic—using office space & phone of Griswald & Swithers, 504 Dekum Bldg., At. 7654.

Brought order etc. and left subject to your approval.

5:35 Robert Smith wants you to call him tonight—before 10:30 or 11:00 or in the morning.

Friday [1-30-48—notation in pencil]

Francis home.

4:50 Ruth has claim on last car of doors. Should be F-82. Are: 2 panel not F-82. Grade A 2% B, 70% B with C D from Grant Mfg. Co., Calif. Price concession and refund wanted. Lock rail centered on Panel. 4" instead of 7¾". Customer now has doors warehoused. (Mentioned 40c as acceptable refund.)

Ruth wants widths on shiplap 8-10 or 12". Meiter says flooring is as follows 1 car now loaded others to follow at 10 to 14 day intervals. He wants orders on his 5 cars of clears.

11:15 a.m. Ruth Meyer order: Im. shipment 1 car 1 x 3 flooring—Ship to Western Seaboard Lbr. Co., Fontana, Calif., Santa Fe Del. [A.T.&S.F.—notation in pencil]

12:40 B. J. Adams order: in 14 days 1 car 1 x 3 flooring. Ship to Hogan & Van Gelder, 621 Bay Shore Blvd., S. F., Cal. G.N.W.P. Del. (Western Pacific Del.)

(Testimony of Mrs. F. A. Lytle.)

(You were supposed to call Mr. Adams this morning—what happened?)

Dick Meiter phoned that flooring wouldn't all

Defendant's Exhibit P—(Continued)

be 1 x 3. There would be some 1 x 4.

Change OK with Adams.

OK with Ruth if one open account.

OK with Bartholic & Rake Bros.

Mr. Darling: Would it be under the rule permissible to have that one page taken out and return the book?

The Court: Yes, the one page. Do that later. Continue the examination.

Q. (By Mr. Darling): Did you ever have any further conversation with Ruth Meyer on this matter?

A. Well, I would say probably, because I talked with her quite often, but I don't recall specific instances.

Q. This is all you know about this transaction, then, within your own knowledge, is that it?

A. I believe that is all that pertained to this particular transaction.

Mr. Darling: That is all.

Cross-Examination

By Mr. Prendergast:

Q. Now, as I understand it, on Friday afternoon, January 30th, 1948, Ruth Meyer phoned you and wanted to talk to Mr. Lytle. You informed her he

(Testimony of Mrs. F. A. Lytle.)

wasn't home. She said she had just heard from Barger in North Carolina. A. Yes. [152]

Q. And Barger said that he was not satisfied on the car of doors because they should be F-82, and they are two-panel not F-82. You wrote that down?

A. That is right.

Q. And that they were graded 2 per cent B and they were 70 per cent B with C and D's in it; that is what Ruth Meyer told you?

A. That is what Ruth Meyer said and that is what I wrote down.

Q. And that they wanted a refund or price suggestion which she suggested?

A. That is right. It was my understanding that the suggestion of the 40 cents was Mr. Barger's suggestion.

Q. Now, wait a minute; I am just asking you now what you wrote down. You wrote down as she talked to you, you wrote down what was said?

A. Yes.

Q. And this lock rail, centered down the panel, four inches instead of seven and three-quarters inches. The customer now has the doors warehoused.

A. That is what I understood her to say.

Q. That was on the 30th of January?

A. Yes, and——

Q. And then you have parenthetically "40 cents an acceptable refund." Ruth Meyer said that?

A. I understand it was Mr. Barger's suggestion, but Ruth Meyer [153] suggested it. After all, I didn't have any conversation with Mr. Barger.

Q. But you put that down at the time; you put the other conversation down. That is all.

(Witness excused.)

Mr. Darling: Call Stewart McLaughlin. [154]

STEWART McLAUGHLIN

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Darling:

Q. What is your name?

A. Stewart P. McLaughlin.

Q. And by whom are you employed?

A. Interstate Lumber Sales, Inc.

Q. Are you an officer of that corporation?

A. I am.

Q. And what is your position with the corporation?

A. I am the sales and office manager and Secretary-Treasurer of the corporation.

Q. Now, you do all those duties, do you?

A. I do.

Q. Back in January of 1948 for whom were you working?

A. J. L. Whitehouse.

Q. And just for him individually, is that it?

A. And, before him, Dodds and Whitehouse.

Q. You worked for Mr. Dodds of Austin Dodds Lumber Company before that?

A. I did.

Q. In January of 1948, at the time of this ship-

(Testimony of Stewart McLaughlin.)

ment of doors or this order of doors that we are talking about in this case, [155] what was your position? A. As sales and office manager.

Q. And what did your duties consist of?

A. Oh, managing the office, selling, getting our circulars, generally trying to sell lumber.

Q. With reference to his particular order from Ruth Meyer, in order to save a little time, do you recall this particular order? A. I do.

Q. And you are the Mr. McLaughlin that has been mentioned here a number of times as having phone conversations and letters? A. I am.

Q. All right; now, you just tell the Court what you know about this particular order of Ruth Meyer, from Ruth Meyer on this carload of doors; how did you first hear about it and what did you do?

A. Well, "Al" found out there was a car of doors for sale. It was offered to him subject to prior sale, and he did mention to the office about it, and later on he sold it and when it had been sold he let us know about it on the phone and we got the car under way by wiring the mill that had the car offered out.

Q. Did you handle the various financial transactions in connection with this particular order; was that part of your function? A. Yes.

Q. Did you pay the——

A. There was nothing out of the ordinary.

Q. I mean, that is part of your duties?

A. That is part of my duties.

(Testimony of Stewart McLaughlin.)

Q. Did you pay the manufacturing company in California?

A. I paid the First National Bank at Eugene. They drew on us on sight draft and the sight draft come in.

The Court: What was attached to the draft?

A. Attached to the draft was an invoice of the mill and a bill of lading, probably an order bill of lading.

The Court: Do you have the invoice here?

Mr. Darling: I have it here. We will offer this.

The Court: I don't suppose they started this car until they got a return on the draft, do you think?

A. I think they started the car when they had a firm order. And they protect themselves by taking the money on a draft.

The Court: Well, they are not protected until they get a return on the draft.

A. They still own the car, though.

The Court: Well, the bill of lading would come back to them if the draft were not paid; that is your point?

A. That is right.

(Invoice of Grant Manufacturing Company, dated January 12, 1948, to Austin-Dodds Lumber Company, so produced, was thereupon marked [157] received in evidence as Defendants' Exhibit Q.)

166

PHONE

NAME

MA

ADD

CITY

DELIVER

1

1

Chick

DELIVER

RECEIVED

Grant Mfg. Co.

FORMERLY CRAIG & PLUMMER CO.

Door Manufacturers

PHONE 9-0313

P.O. BOX 47

3610 RIO LINDA BLVD.
DEL PASO HEIGHTS, CALIFORNIA

Inv.

7441

DATE January 12, 1948

TAKEN BY

DELIVERY WANTED

TERMS 2% Sight Draft

ORDERED BY

NAME Austin-Dodds Lumber Company

MAKING
ADDRESS

CITY Eugene, Oregon

Car No. AT4SF 149509

Route - SW WP DRG CB40 Southern Delv.

DELIVER TO

Douglas Fir Lumber

1,006 - 2-8 x 6-8 Two Panel Doors

@ \$ 7.00

\$ 7,048.80

400 - 2-0 x 6-8

@ 7.00

3,040.00

93 - 2-6 x 6-8

@ 7.00

757.95

1 - 2-6 x 6-8 One

@ 7.00

7.00

\$11,400.00

Less 2%

228.00

\$11,172.00

2% B Doors

DEFENDANT

EXHIBIT

Case No. 4224
D.B. G. WOLCOTT
Reporter

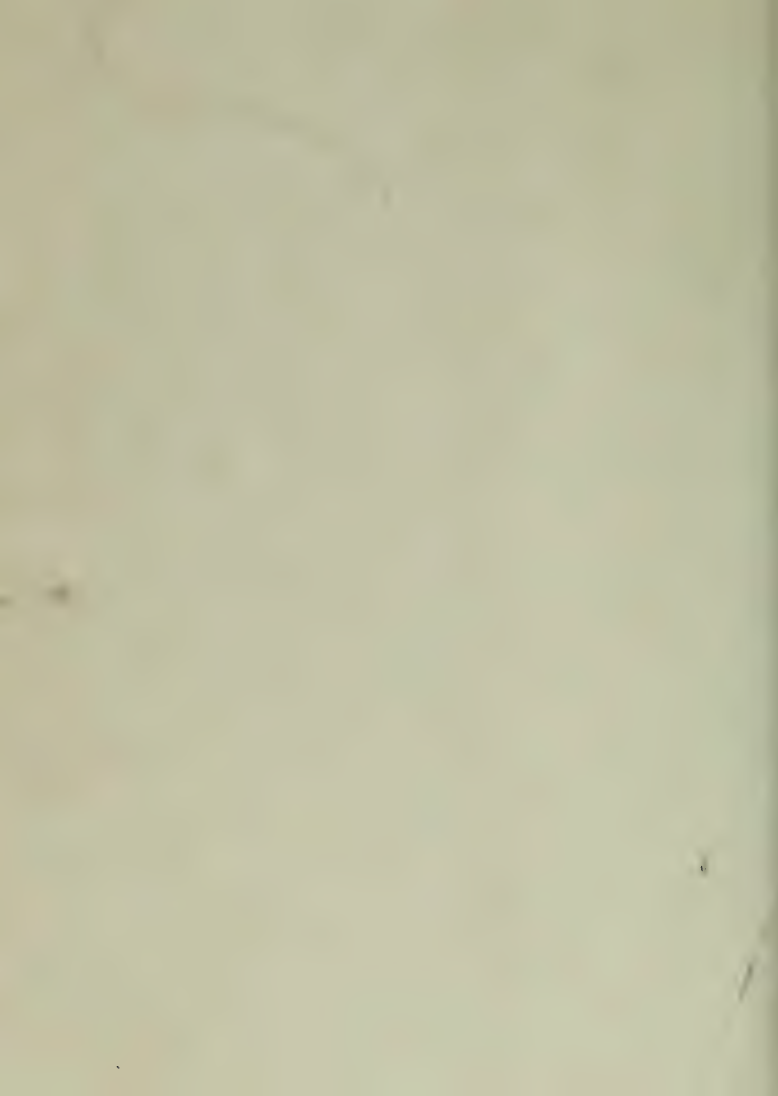
DATE OF DELIVERY

DELIVERED BY

RECEIVED IN GOOD ORDER BY

SALES TAX

TOTAL



(Testimony of Stewart McLaughlin.)

Q. (By Mr. Darling): Did you institute the order from the California concern before you received your written order?

The Court: What does an order bill of lading mean? I have heard it discussed. You might state it again.

A. An order bill of lading is a bill of lading covering a car, and on that bill of lading part of the terms are that the car is not to be set in or delivered to the customer until the railroad has the bill of lading; in other words, that is an order that prohibits, different from a commercial bill of lading. That order bill of lading prohibits the railroad from setting that car in until they get possession of the bill of lading back.

Q. (By Mr. Darling): Do I understand as soon as you received the oral information that this order was made by Ruth Meyer that you contacted the manufacturer?

A. We wired them.

Q. By wire? A. Yes.

Q. Told them to ship them? A. Yes.

Q. And you would follow it with your confirmation of the order? A. That is right.

Q. Now, when did you first hear about any difficulty with this car? [158]

A. "Al" called and stated that there was a claim on the car.

Q. Now, did you get a letter from Ruth Meyer?

A. Later on.

(Testimony of Stewart McLaughlin.)

Q. When this purchase order came in, the written purchase order, did you notice that she had put in typewriting the name "Agent" underneath "Ruth Meyer"? A. No.

Q. Had you had prior dealings with Ruth Meyer?

A. Quite a few dealings with her.

Q. Did you consider her as a wholesale lumber dealer? A. Yes, we did.

Q. And dealt with her on that basis?

A. We did.

Mr. Prendergast: If the Court please, the questions are a little bit leading; the testimony is coming from Counsel rather than the witness.

The Court: He feels this is an important witness and doesn't want you to lead.

Q. (By Mr. Darling): I hand you Defendants' Exhibit H. Did you receive the letter that that purports to be from Ruth Meyer?

A. Yes.

Q. As far as the information you obtained from that letter, what did you understand to be the claim by Ruth Meyer?

Mr. Prendergast: If the Court please, the letter speaks [159] for itself. I object to him——

The Court: Sustained.

Q. (By Mr. Darling): Now, following the receipt of that letter and the request for an adjustment in price that is mentioned in the letter, what did you do?

(Testimony of Stewart McLaughlin.)

A. Well, I called up Barger, the customer.

Q. When did you call him?

A. About February the 4th.

Q. Now, you heard Mr. Barger testify before and he seemed to be not too sure when the call was. Have you any way of knowing that the call was on February 4th?

A. I checked the telephone record and that is the date of the call to his town, and we have no other customers in his town.

Q. Did you have only the one call with him?

A. That is the only one I could find, yes; that is the only time I talked with him.

Q. What was the purpose of the call?

A. Well, as a matter of policy we like to get to the bottom of something like this because we are standing next to the mill or the shipping mill and to go back on them for any kind of a complaint you have to have the facts and you save time and confusion to try to ascertain the facts rather than through a third party, and in some cases there might be more—we go direct to the person who is filing the complaint so that we have first-hand information to go back on the mill to see if we can [160] work out something on it.

Q. Do you remember the time of the day that you made the call?

A. It was late in the afternoon here because I got Mr. Barger at home.

Q. Now, you heard Mr. Barger testify as to the

(Testimony of Stewart McLaughlin.)

nature of that conversation, and you tell the Court what the conversation was.

A. Well, I called him, told him who I was, who I was representing, and just asked him what the trouble was. And he said that the doors were pretty much off-grade, in fact, the bulk of them were B grade, and there would be a scattering of maybe better grade, and the balance of them were lower; that is, lower than B grade. He complained that they were bought for 2 per cent B and better, and they were not, and I talked to him and told him that I would go back on the mill and see if I could get him some price adjustment on the shipment, which I did.

Q. Well, now, did he at the time tell you that he was returning those doors or offered to return the doors? A. No, he didn't.

Q. Did he tell you that he was rescinding the contract that he now claims?

A. No, he did not.

Q. Did he tell you that he was holding the doors for you? A. He did not.

Q. Did you ask him at the time?

Mr. Prendergast: Of course, these questions are very leading, [161] your Honor. I am sorry to interrupt, but I think he could approach it in a different manner without leading the witness.

Q. (By Mr. Darling): Tell us what he said with respect to—I will withdraw that. Tell us what you said with respect to asking him to act in any

(Testimony of Stewart McLaughlin.)

way as your agent in the selling and disposing of these doors.

A. No. I told him, after listening to his complaint, that I thought I could get an adjustment on the price from the mill that shipped it, and that I would try to do that and, as I recall, that terminated our conversation.

The Court: Did the mill make an adjustment?

Mr. Darling: \$300.

Q. Tell the Court what efforts you made thereafter in regard to getting an adjustment from the mill.

A. Well, I called the Grant Manufacturing Company and I got Mr. Craig or his partner. I could never get them together, but I would get one or the other.

The Court: Gray?

A. Craig.

The Court: What was the name of the firm?

A. Grant Manufacturing Company. And they, as I would get one or the other of these men, they would promise to take the matter up with the other party and work out a settlement. They apparently were never able to get together and quite a bit of time lapsed since I had talked to Mr. Barger, and finally we [162] sent down a representative of ours who was stationed at Yreka to go down personally and see if he couldn't stop the runaround we had been getting. He did that and was down in Sacramento or Del Rio for several days. He got a check.

(Testimony of Stewart McLaughlin.)

He took it up with the mill company's attorney who advised him that the mill itself was on rather shaky ground and that he had best take the check that they had given and call himself well off. They gave him the check too late to cash in Sacramento. He didn't have time to stay down there any longer so he mailed the check back to Eugene and I collected it or entered it for collection. I thought I could collect it a little quicker, and I asked the bank to notify us in the event that the check bounced at Sacramento. Apparently the stickers or tickets that they put on those requests going through fell off and we didn't hear anything, and we checked the bank every day, and at the end of about two weeks we figured the check the millwork company had given us was good and we could then go out and work a settlement on the car.

The Court: Did the check go through?

A. Apparently it did. I haven't seen it since.

Q. (By Mr. Darling): Now, at the time you were making these efforts with the Grant Manufacturing Company did you understand the situation to be that 40 cents on a door would be an acceptable——

Mr. Prendergast: Now, if the Court please, this is pure [163] leading, and Counsel is doing all the testimony here and I object.

The Court: Sustained.

Q. (By Mr. Darling): All right. At the time you were making these attempts to obtain an ad-

(Testimony of Stewart McLaughlin.)

justment in price with the Grant Manufacturing Company what did you understand the situation to be, the situation concerning the demand of Ruth Meyer or Barger in so far as a settlement of their claim on this carload of doors was concerned?

A. Well, in talking it over with Mr. Lytle and after talking to Mr. Barger—he painted a pretty black picture on those doors—and I went at it that probably if I could get him the freight, or a dollar a door that it would more than satisfy his demands.

Q. Did you know anything at the time about any offer or suggestion of an amount per door by Ruth Meyer or Mr. Barger which would be an acceptable settlement?

A. Mr. Barger and I mentioned no amounts, and I would say it was after my conversation with him that I learned that 40 cents a door would be acceptable.

Q. I would like to hand you here Plaintiff's Exhibit 5. Do you recognize what that is?

A. I do.

Q. What is it?

A. That is my letter to Bill Robb, who is our man in Yreka [164] that went with the invoice, Grant's invoice. I sent that to him down in Yreka and hoped I had made it strong enough that he would go down to Sacramento and see what kind of a settlement could be made. This letter was written after it was quite apparent that we could not pin down any of the either owners or partners

(Testimony of Stewart McLaughlin.)

of this Grant Manufacturing Company over the phone.

Q. Did you write a letter in June of 1948, June 25—I hand you Plaintiff's Exhibit 4. What is that letter?

A. That is a letter written by me to Barger Millwork Company stating what we had done, what we had been able to do in regard to the settlement of this particular car.

Q. Well, now, with that letter did you send a check in the amount of \$615? A. I did.

The Court: We know that is it.

Mr. Darling: It is Defendants' Exhibit I.

Q. And you signed it Interstate Lumber Sales, Inc. by your own name? A. I did.

Q. This Defendants' Exhibit K, a copy of a sight draft on the First National Bank, or order of First National Bank of Eugene, \$12,225, will you tell the Court whether that is a copy—You have seen it, have you not, Defendants' Exhibit K, the check—Would you like to look at it?

The Court: That is all covered. That is what you paid to [165] the mill?

Mr. Darling: No, I think to Ruth Meyer. Just tell the Court how you were paid, how Interstate Lumber Sales was paid on this account.

A. We drew a draft on Ruth Meyer, Bank of California, Portland, and took this.

The Court: How did you happen to send it to the Bank of California?

(Testimony of Stewart McLaughlin.)

A. Probably knew she banked there.

The Court: Had you drawn on her before, had transactions with her before?

A. I don't believe. We might have a previous car of doors; lumber, no. This draft, or the original of this draft, was tied to our bill of lading and an endorsed bill of lading deposited in the First National Bank of Eugene.

The Court: Endorsed what?

A. Endorsed order bill of lading.

The Court: That is the one you got from California?

A. That is right, the same one, and deposited in our bank and they in turn sent it to Portland and collected the money for us. When it come back, they put the money in our account.

The Court: Well, the car was rolling at that time? A. It was.

Mr. Darling: The Court asked concerning payment to the Grant Manufacturing Company. We have an order draft on that [166] and we would like to have it marked.

The Court: Let Counsel see it.

Mr. Darling: That is in conformance with the bill of lading.

(Sight Draft to the order of Grant Manufacturing Company dated January 13, 1948, so produced, was thereupon marked for identification Defendants' Exhibit R.)

Q. (By Mr. Darling): I ask you what that is, marked for identification R.

(Testimony of Stewart McLaughlin.)

A. How is that?

Q. I ask you what that document is that is marked Defendants' Exhibit for Identification R?

A. That is a sight draft drawn by the Grant Manufacturing Company on Austin Dodds Lumber Company covering the car.

The Court: Covering this car of doors?

A. This car of doors, yes.

Mr. Darling: We offer it in evidence.

The Court: It is admitted.

(Defendants' Exhibit R, previously marked for identification, was thereupon received in evidence.)

CUSTOMER'S DRAFT.

Value received
 To Mr.
 Thru

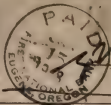
FZ-204 12-41

Case No. 10100MB
 R. A. G. HOLCOMB
 Reporter

CUSTOMER'S DRAFT

Bank of America

NATIONAL TRUST & SAVINGS ASSOCIATION



JAN 13 1948 19

at sight

Pay to the order of

Grant Mfg Co

\$11172.00

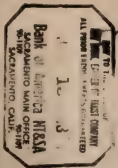
EXACTLY \$11172.00 CTS

Dollars

Value received and charge the same to account of
To Justin Rodde Lumber Co.
Shaw 1st National Bank
Eugene, Oregon

Grant Mfg Co. Reg.
J. B. Craig

FD-204 12-41



Grant Mfg Co.
J. B. Craig

12315

(Testimony of Stewart McLaughlin.)

Mr. Darling: You may cross-examine. [167]

Cross-Examination

By Mr. Prendergast:

Q. Now, Mr. McLaughlin, as a matter of fact, you heard from Lytle that he had placed this car of doors on the 11th of January, 1948, did you not, and you were invoiced for this car of doors by Grant Manufacturing on January the 12th, 1948, and they sight-drafted you on a 2-per cent sight draft on January 12th, 1948, and the First National Bank at Eugene paid the Grant Manufacturing Company \$11,172 on January the 15th, 1948, which made the car your car; isn't that a correct statement? A. Yes.

Q. Now, on January the 19th, 1948, four days after you bought the car, the People's Loan & Savings Bank accepted the sight draft of the Bank of California National Association which had been forwarded, so that that transaction followed the transaction in which your company, the Austin Dodds Lumber Company, bought the car. You bought the car and paid for it before you ever sold it to Barger, did you not, four days?

A. We did not.

Q. Well, you paid for it on the 15th of January. You did not deliver the bill of lading; it was an order bill of lading which means it cannot be opened or inspected or delivered until the bill of lading is delivered.

(Testimony of Stewart McLaughlin.)

A. We sold the car to Ruth Meyer. [168]

Q. You shipped it to Austin Dodds at Statesville, North Carolina on an order bill of lading.

A. Yes.

Q. Which was not to be delivered to Barger Millwork Company where it was destined until the bill of lading was delivered to the railroad. The bill of lading was left with your bank with the sight draft from the First National Bank at Eugene on the Bank of California at Portland and until that was paid the bill of lading was not delivered; isn't that a fact?

A. That is right.

Q. So that all the time that this car, from the 15th day of January, 1948, until that car arrived in Fayetteville, North Carolina, where it was diverted, sometime along near the end of the month, that car belonged to the Austin Dodds Company; it was in their name, it was destined to them; isn't that a fact? A. No.

Q. Whom did the car belong to?

A. The car belonged to Ruth Meyer.

Q. Ruth Meyer didn't get it until it was paid for and that wasn't paid for until after the 19th of January.

A. Then it was her car.

Q. When?

A. As soon as she paid for it.

Q. But she didn't pay for it. She didn't pay for it because [169] you knew it came from the Barger Millwork Company. You knew that Ruth

(Testimony of Stewart McLaughlin.)

Meyer was merely an agent, had been an agent broker, or whatever you call it, in the sale of cars before.

A. We had always considered Ruth Meyer as a wholesaler and our draft going into Portland was drawn on Ruth Meyer, the Bank of California, Portland, Oregon.

Q. And you were apprised of the fact that at that time, regardless of whom the car was sold to, you held the title to that car until at Fayetteville, North Carolina, the bill of lading was delivered to the railroad company; that was your instruction, wasn't it?

A. We held title to that car until Miss Meyer picked it up in the Bank of California; then it was her car, she held title to it.

Q. When did she pick that up?

A. Well, the bank at Eugene gave us credit for this sight draft on January the 19th.

Q. January 19th? A. At Eugene.

Q. Now, this car that you bought—Now, may I have that exhibit, Mr. DeMott, please, the one that is a letter of June the 25th. In this letter you informed the Barger Millwork Company that you had sold the car to the Barger Millwork Company through Ruth Meyer in Portland, Oregon. That is in all your letters, I think. In your letter of March 9th, 1948, "Quite [170] some time ago we shipped, through Ruth Meyer, a carload of doors"—and that was your attitude, you were dealing with them

(Testimony of Stewart McLaughlin.)

through Ruth Meyer; that is the expression in your letters.

A. That is the language in the letters.

Q. Now, you informed Barger at that time your profit was \$300, that you would refund that and the mill would give you \$300 and Ruth Meyer would give \$300.

A. Yes.

Q. That was your letter of June 25th. At that time you knew your profit was well in excess of \$1,000 on this car. You paid \$11,172 for this car and you sold the 1500 doors for \$8.15, or \$12,225, so when you told Barger you only made \$300 on that car you misstated it, didn't you?

A. I didn't say that was all our profit.

Q. You said you will allow our profit of \$300.

A. I said we will allow you our commission.

Q. But, actually, you had a profit of over \$1,000, didn't you?

A. We did.

Q. So that when you said "Commission" to him you didn't mean anything; you were misstating it, were you not?

A. I was not.

Q. What?

A. I was not.

Q. Well, did you have a commission or a profit?

A. We had a profit. [171]

Q. So when you said "We will allow you our commission of \$300" what did you mean?

A. We quite often use the word "commission," meaning profit.

Q. But your profit wasn't \$300?

A. No.

Q. It was a thousand and some dollars?

(Testimony of Stewart McLaughlin.)

A. Right.

Mr. Prendergast: May I have the letter of May the 17th.

Q. Now, these order bill of lading, let me ask you about that. There is no right of inspection until after the bill of lading is delivered. When the bill of lading is delivered then the car is turned over to the person delivering the bill of lading, so there is no right of inspection until that time, and the bill of lading is not delivered until the car is paid for, so that is the difference between them.

A. And also until the railroad gets their freight.

Q. And also until the railroad gets the freight.

A. That is right.

Q. So, in other words, a man buys a "pig in a poke" on an order bill of lading; he has no right of inspection before that?

A. There is no right of inspection on any bill of lading.

Q. It is if it is put on there, prior right of inspection. Now, this letter of May 17, 1948, which is marked Plaintiff's Exhibit 5 and introduced by the defendant here, is your synopsis of actually what transpired, is it not, and you wrote it, signed "Mac, S. P. McLaughlin," to "Bill," a representative of your company?

A. Bill Robb, yes.

Q. And in this letter you say, "We will attempt to give you a synopsis of what has gone on regarding the car of doors that we shipped out of the Grant Manufacturing Company to the Barger Mill-

work Company at Statesville at North Carolina and on which a complaint has been filed.”

Now, you shipped it out of the Grant Company according to the letter to Barger. “There is no doubt as to the customer’s right on this complaint as the stock was not what it was supposed to be. In order that you can more or less review the situation we have enclosed a copy of our order to the Grant Manufacturing Company, their original invoice and on this please note that they have marked 2 per cent B doors and a copy of our invoice to the customer as well as a copy of the order we took from Ruth Meyer.”

Now, let me interrupt the reading to ask you—and I am referring now to Defendants’ Exhibit Q, which is the invoice from the Grant Manufacturing Company—when you bought these doors from the Grant Manufacturnig Company you did not buy F-82 doors and it was not so designated any place, was it? You bought Grade B doors from the Grant Manufacturing Company and you were invoiced and paid for Grade B doors, and there is nothing about F-82 doors on there?

A. That is 2 per cent B doors. [173]

Mr. Prendergast: You might hand this to the witness.

Q. Examine that closely and tell me if there is anything on there to indicate you bought F-82 doors from the Grant Manufacturing Company?

A. They are not marked F-82 doors.

Q. So, when you bought that, paid for it, from the Grant Manufacturing Company and sold to

Barger you knew you were selling Barger something that you had not bought from the Grant Manufacturing Company, nor had you paid the Grant Manufacturing Company for F-82 doors? You bought some Grade B doors and paid for them and sold them as F-82 Grade A doors to Barger; is that not a fact. A. We did not.

Q. That is your invoice of what you bought from Grant?

A. That is right; I agree.

Q. And here is your invoice of what you sold to be shipped to Barger, and this is Plaintiff's Exhibit 2. Now, if you will notice your invoice you bought Grade B doors, not F-82, and you sold, or represented to have sold Grade A doors with not more than 2 per cent B F-82 doors. Those are the same doors, aren't they; it is the same car?

A. Grant Manufacturing Company's invoice says 2 per cent B doors.

Q. It doesn't say anything about F-82?

A. It would be a F-82. [174]

Q. There are lots of two-panel doors that are not F-82? A. That is true.

Q. Now, it goes on and says: "The doors were represented to Lytle as F-82 doors and that they would not run over 2 per cent B grade. In the first place, they were not F-82 doors. They were instead a two-panel door but not a stock item. From what information we have been able to gather they had very, very narrow stiles and rails. In other words, they were not a standard pattern F-82 door. In the

(Testimony of Stewart McLaughlin.)

second place, the customer stated that 60 to 70 per cent of the doors might by wide stretch of imagination grade out B grade and there were a considerable number of doors that would grade C and D. He said that on close inspection one might find a few A doors. In regards to the manufacture he further stated that the lock rail was centered on the panel and the rail was only four inches wide instead of the approximately eight inches on the standard door. We talked to him on the phone and he told us that he just didn't know where he would sell them unless he could get some contractor to take these doors and put them in a bunch of houses. In other words, being as they are not stock items they cannot be used as replacements, nor can they be sold very readily to the ordinary trade. The millwork company has been exceedingly nice about this lousy shipment and I have tried from here, both by wire and by phone, to get some settlement from the Grant Manufacturing Company. My efforts have resulted in nothing. I even tried to [175] scare them into'—

The Court: Why are you reading that? He remembers he wrote the letter.

Q. (By Mr. Prendergast): Now, you did make a settlement with the Grant Manufacturing Company, is that right? A. We got \$315.

Q. And what did you sign in exchange for the \$315; what sort of a settlement did you make?

A. I didn't personally pick up the check.

(Testimony of Stewart McLaughlin.)

Q. Are you familiar with what your corporation did? It was the Interstate Lumber Sales that made the settlement.

A. It was the Interstate Lumber Sales that made the settlement.

Q. And the check was made to Interstate Lumber Sales? A. It was.

Q. And what sort of a settlement did you make with the Grant Company?

A. Mr. Robb reported back what I had outlined in one of my letters, that that is all he could get out of them, and on advice——

Q. Please answer my question. What sort of a document did you get? A. We got a check.

Q. And what did you give them in exchange for the check? A. As far as I know, nothing.

Q. You mean they just gave you a check? [176]

A. That is right.

Q. Nothing else; after you had had all the trouble with these people, they just took a check and no receipt from you or anything to show full settlement of any claim?

A. None was ever mentioned.

Q. Did you consider for that \$315 the Interstate Lumber Sales had been fully settled for any claim and had fully settled any claim against the Grant Company?

A. Mr. Robb told them, as he reported back to me, that he would take the check subject to the final approval of the whole settlement.

Q. Of whom?

(Testimony of Stewart McLaughlin.)

A. Of the whole settlement, to get the whole settlement worked out on that basis, that would be okeh.

Q. And you put that check in the bank right away? A. I did.

Q. And in June you wrote to Barger and you told him you were going to give him your commission of \$300 and the mill was going to give him \$300 and Ruth Meyer was going to give him \$300 in settlement of his \$12,000 claim and that that would cover his freight and that was about all, isn't that about right? A. Yes.

Q. When you talked to Barger on the telephone on the 4th of February and he complained, as you say, very bitterly about the grade and the standard of these doors, you did not discuss any [177] price at all at that time; that is your testimony?

A. We did not.

Q. And that was the only time that you talked to Barger, except possibly in the fall when he came out here? Did you talk to him in the fall?

A. I might have greeted him; that is all.

Q. But you didn't discuss anything?

A. No.

Mr. Prendergast: That is all.

Redirect Examination

By Mr. Darling:

Q. This, as I recall the letter of June 25th, did you say anything in that about foregoing all your commission? I just want to make it clear. I think there was some prior letter in which you said—

(Testimony of Stewart McLaughlin.)

March 9th—in which you said you were willing to forego your commission, but I don't believe in your June 25th letter that you told them that the \$300 was your commission. I think it was prior to that, just so the record is straight and the Court will see all the letters.

The Court: Yes. Step down. You have one more witness, I suppose, Mr. Darling. I suppose you are going to call Mr. Whitehouse.

(Witness excused.) [178]

Mr. Darling: Unless he is another expert.

The Court: Yes. You have had three experts. How long a witness will Mr. Whitehouse be?

Mr. Darling: Probably ten minutes.

The Court: Supposing you put him on.

Mr. Darling: Call Mr. J. L. Whitehouse.

J. L. WHITEHOUSE

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

The Court: Now, in making your own plans, you will want to argue the case. You can come back at 9:00 o'clock in the morning to do that. If you want to go to Eugene, I will stay.

Mr. Prendergast: Your Honor, the only thing is that I have the case that follows this and that will start at 10:00.

The Court: I said we will do it tonight or come back in the morning.

(Testimony of J. L. Whitehouse.)

Mr. Prendergast: I am perfectly willing to accommodate Counsel.

Mr. Darling: Of course, we would prefer to do it tonight if it is not too much of a hardship.

The Court: All right. Proceed.

Direct Examination

By Mr. Darling:

Q. Now, Mr. J. L. Whitehouse, will you tell us what your [179] present occupation is?

A. Lumber wholesale.

Q. Were you engaged as an individual in the lumber wholesale business in January, 1948?

A. I was.

Q. And you are the Mr. Whitehouse that has been mentioned here a number of times as doing business as Interstate Lumber Sales?

A. I am.

Q. And what is your present position in the corporation of Interstate Lumber Sales, Inc.?

A. President.

Q. And you have associated with you in that corporation Mr. McLaughlin that just testified, and Mr. Lytle?

A. I have.

Q. Now, in January of 1948 Mr. McLaughlin was working for you, as I understand it?

A. That is correct.

Q. All right; now, when did you first hear, if you can recall, concerning the complaint on this carload of doors?

(Testimony of J. L. Whitehouse.)

A. It would have been sometime the latter part of February, possibly the first part of March.

Q. What was the nature of the information that you received?

A. The information I received was that we had a car of doors in North Carolina upon which we had a claim filed.

Q. Did you know to whom those doors had been sold? [180]

A. I didn't at the time. I inquired, naturally, and learned they had been sold to Ruth Meyer.

Q. Had you had prior dealings with Ruth Meyer? A. We had.

Q. Did you know what position Ruth Meyer occupied in the trade?

A. As a—she was listed as a wholesaler.

The Court: What do you mean "listed"?

A. In the Lumberman's Red Book, sir.

The Court: That is a credit book?

A. That is a credit book.

Q. (By Mr. Darling): Did you deal with her on that basis? A. We did.

Q. Did you in January of 1948 know the Barger Millwork Company? A. I did not.

Q. Or the plaintiff in this case?

A. I did not.

Q. Did you know anything concerning the nature of their business? A. I did not.

Q. Now, did you know about this letter of June 25, 1948, which was written by Mr. McLaughlin to Barger, the plaintiff here in this case?

(Testimony of J. L. Whitehouse.)

A. That is the one where the check was mailed?

Q. Yes. [181] A. Yes, I did.

Q. Well, did they explain to you the basis upon which that letter was being written? Did you know the basis?

A. I knew that it was being——

Mr. Prendergast: Now, if the Court please, I object. He asked the question “Did they explain to you the basis upon which it was written,” and he is answering. Now, that is——

Mr. Darling: I will withdraw the question.

Q. Was this letter written with your authority and at your request?

A. I would answer that by saying that I have at all times instructed and expected Mr. McLaughlin to make the sales, to follow up on any collections that might be made or necessary, and as such expected him and instructed him to act in my behalf.

Q. Was he so acting at that time?

A. That he was doing.

Q. When he wrote that letter?

A. That is right.

The Court: What was your volume for any twelve-months period in about this time, '48; how big an outfit were you?

A. I'd like to refer that question to Mr. McLaughlin if I might. He is the one familiar with that.

The Court: Can't you give me an approximate figure? How much of it was doors?

(Testimony of J. L. Whitehouse.)

Mr. McLaughlin: How many cars were shipped?

The Court: 1948, 1947.

Mr. McLaughlin: It would have been about \$1,-200,000.

The Court: And how much door business did you do?

Mr. McLaughlin. Oh, by cars, a small percentage.

The Court: Well, a hundred cars?

Mr. McLaughlin: No, no. Probably a dozen.

Mr. Darling: 1947 was Austin Dodds.

Mr. McLaughlin: Austin Dodds.

The Court: All right.

Q. (By Mr. Darling): Well, now, did you hear anything further or anything from Barger or the plaintiff in this case after that letter was sent in June of 1948?

A. Not until September when the check was returned.

Q. When was the first time that you—I will put it this way: Did you ever receive any information to the effect that the plaintiff in this case had rescinded his order for the doors?

Mr. Prendergast: If the Court please, I object to that as being leading.

The Court: You may answer.

A. I did not until Mr. Barger called in my office personally.

Q. (By Mr. Darling): Was there a letter—what about the letter with the check; did you get any indication from the letter with the check that he considered the doors yours?

(Testimony of J. L. Whitehouse.)

A. I did not.

Q. I will hand you Defendants' Exhibit B for the purpose of [183] refreshing your memory, if required.

A. All right. This was the letter that I answered, I believe.

Q. What?

A. This is the letter that I answered and returned the check.

Q. Did you consider that letter as any notice by Barger, the plaintiff in this case,—

Mr. Prendergast: If the Court please, I object to this question as calling for a conclusion. The letter speaks for itself.

The Court: He may answer.

A. This letter arriving—in other words, our check having been mailed in June, this letter having been received in September, our check having been held by the Berger Millwork Company for that length of time constituted, as far as I was concerned, settlement of the claim.

Q. (By Mr. Darling): Now, then, following the receipt of that check did you write another letter to him, to Barger Millwork, the plaintiff in this case?

A. Following the receipt of the check in this letter?

Q. Yes.

A. No, just the one, this September 23rd, that

(Testimony of J. L. Whitehouse.)

was the answer to this one in which I sent the check back.

Q. And when you sent back that check what was your understanding about what you were doing?

A. That the matter was settled as far as we were concerned, the [184] claim was settled.

Q. Now, Mr. Barger came out here sometime in October he states. Do you recall having met with him at the time?

A. Yes, I met with Mr. Barger and Miss Meyer both in my office.

Q. Did Mr. Barger state anything to you concerning any activities that he had had following receipt of your letter of June 25, 1948, with respect to selling or attempting to sell these doors?

A. He did. He stated that he had tried to sell the doors, that he had gone so far as to hire a man outside of his employ who rented space in an adjoining town and that the doors had been trucked from his warehouse to the adjoining town, that a sale had been proposed and put on and that the doors, there had been an attempt to dispose of the doors in that way.

Q. Did he at that time give you any indication as to whether or not he was conducting the sale for himself or for you?

A. For himself.

Q. Now, was Ruth Meyer present at any time when these conferences with Mr. Barger—

A. She was present at that time.

(Testimony of J. L. Whitehouse.)

Q. Did you say anything to her at all concerning the payment of \$300 to Barger, as indicated by the letter of June 25, 1948?

A. I did. I asked Ruth Meyer if she had sent her \$300 to Mr. Barger. She nodded her head and Mr. Barger made no comment.

Q. Was Barger in position to see her nod her head? [185] A. He was.

Q. Hear you address the question?

A. He was.

Q. This picture that has been in evidence, you have seen it? A. I have.

Q. Plaintiff's Exhibit 9. Did Mr. Barger tell you anything concerning the taking of that picture?

A. Only that he had picked out one of the worst doors in the lot to show the defects, the typical defects of the doors.

Q. You have heard testimony here concerning this 40 cents a door offer. Was that ever brought to your knowledge?

A. No, I don't believe it was. It wasn't. That was—I knew the boys were working on a settlement and I wouldn't testify as to that.

Q. At any time during your relationship with Ruth Meyer in this case did you ever authorize her to ask and suggest to Barger that those doors be sold for your account? A. We did not.

Q. Did you ever authorize the sale of the doors on your account? A. We did not.

Q. Did you ever consider—whose doors did you consider these to be?

(Testimony of J. L. Whitehouse.)

Mr. Prendergast: If the Court please, I object to that.

The Court: He may answer.

A. We considered the doors to be the doors of Barger Millwork, [186] and the only demand on us was a settlement or adjustment in price.

Mr. Darling: That is all. You may cross-examine.

Cross-Examination

By Mr. Prendergast:

Q. Are you familiar with what Mr. McLaughlin was doing in trying to settle this door claim?

A. I checked with Mr. McLaughlin from time to time.

Q. Are you familiar with his letter of May 17, 1948, and in particular with this sentence, "In attempting to make a settlement on these I asked for a dollar-per-door rebate and figured that we could probably get back a quarter from Ruth Meyer per door which would at least pay the poor guy his freight and give him about four-bits a door to lop off the price"?

A. It is not uncommon for a wholesaler who has sold through another in event of claim from matching commission or amounts in order to settle a claim.

Q. You knew that these doors were not salable by anyone? A. I did not.

Q. You were familiar with Mr. McLaughlin's statement that they were not; in other words, "These

(Testimony of J. L. Whitehouse.)

are not stock items and cannot be used as replacement, nor can they be sold readily to the ordinary trade." You knew that, didn't you?

A. I know at the time those doors were sold that doors were scarce. To whom is the letter addressed there, may I ask? [187]

Q. "Bill," Interstate Lumber Sales, Yreka, California. That is Bill Dodds, is it not?

A. No, it is not. That is Bill Robb. That is right.

Q. Robb. Now, in regard to the Interstate Lumber Sales, the Interstate Lumber Sales was what on January 15th of 1948; who was the Interstate Lumber Sales? A. J. L. Whitehouse.

Q. That was yourself. And when you stamped your stationery "Austin-Dodds Lumber Company," which you were using on up into June of 1948, you put "Interstate Lumber Sales, Successor to Austin Dodds Lumber Company." What did you mean by "Successor to Austin Dodds Lumber Company"? Did they assume the obligations of the Austin Dodds Lumber Company?

A. I meant the Interstate Lumber Sales had taken over all the assets of the Austin Dodds Lumber Company, that the personnel was exactly the same, that the only change, the only difference was that Austin Dodds had retired from the business.

Q. So the only change was Austin Dodds went out of the business and you continued to use that

(Testimony of J. L. Whitehouse.)

stationery until September of 1948—No, I beg your pardon—Withdraw that. Now, what was the relationship between the Interstate Lumber Sales and the Interstate Lumber Sales, Inc.?

A. The Interstate Lumber Sales, Inc.—on April 1st, 1948, a corporation was formed in which Mr. Lytle, Mr. McLaughlin, Mr. Robb and myself took over the assets of the Interstate [188] Lumber Sales as an individual.

Q. I see. In other words, the entire business of the Interstate Lumber Sales was taken over by the Interstate Lumber Sales, Inc., is that right?

A. With the exception of certain accounts which I as an individual guaranteed for the corporation, and that was——

Q. Did you guarantee this claim of Barger as an individual to the Interstate Lumber Sales, Inc.; did you guarantee that claim? A. I did.

Q. And so that when the check of June the 25th, which is Defendants' Exhibit I, was signed by S. P. McLaughlin on the Interstate Lumber Sales, Inc., account, that was because of the fact that Interstate Lumber Company account had assumed on your account the obligations of the Interstate Lumber Sales?

A. That is not correct. The Interstate Lumber Sales, that is Mr. McLaughlin acting for me, continued to handle the account as before. However, I carry an open account; there is an open account with Interstate Lumber Sales, Inc., and J. L. White-

(Testimony of J. L. Whitehouse.)

house as an individual upon which accounts are adjusted.

Q. But this is the check of Interstate Sales, Inc.

A. That is not my personal account, however. There is a personal account that is adjusted between myself and the corporation to take care of losses on accounts that I guaranteed.

Q. But this check wasn't written on that account? A. No. [189]

Q. This is the regular corporation account?

A. That is written on the corporation account, that is true.

Q. And, as a matter of fact, your letter of September 23rd, 1948, is written on the Interstate Lumber Sales, Inc., and signed Interstate Lumber Sales, Inc., by J. L. Whitehouse.

A. That is done as a matter of——

Q. And that refers to this same claim of Barger.

A. That refers to the same claim and was done as a matter of routine.

Q. Because of the fact they had assumed——

A. No. Because of the fact that we have, we had the stationery and that is the way the letters were always typed up.

Q. Well, now, you say that you first heard about this transaction sometime after it happened, is that right? A. That is correct.

Q. And you didn't know anything about buying from Grant Manufacturing Company on the 15th and selling through Ruth Meyer on the 19th?

(Testimony of J. L. Whitehouse.)

A. That is correct.

Q. You had no knowledge of that at all?

A. That is correct.

Q. And you didn't hear about it until you heard there was a claim. Now, when did you guarantee the claim of Barger against the Interstate Lumber Sales to the Interstate Lumber Sales, Inc.?

A. That was at the time of the incorporation.

Q. That was in April? A. April.

Q. You guaranteed to pay that claim, is that right, personally? A. Yes.

Q. Let me ask you this: In September, on September the 23rd, 1948, you received your check back that was written in June, this check written on the corporation, you received that back from Barger; and on September the 23rd you mailed the check back to Barger, that same check which was written in June, and in this letter you told him that that is all you were going to do about it, and you testified you considered the matter closed by reason of the fact he had retained the uncashed, uncertified check from sometime around the 1st of July until the 13th of September; is that your testimony?

A. That is right.

Q. In other words, you felt that Barger had accepted \$615 for a \$12,000 investment in February?

A. Let me put it another way. Barger had over two months in which to let us know that the settlement was not sufficient if he wasn't satisfied.

Q. Did you do anything about this check? You had it out for two months, a corporation check.

(Testimony of J. L. Whitehouse.)

A. We had it out—he had it out two months.

Q. You had the check out; it didn't come back to you. Did you call him up or ask him if it was satisfactory or write to him? [191]

A. We received the check there in September, the 13th it was, and it was mailed back on the 23rd.

Q. That is right, and in the meantime he was trying to sell your doors. Did you check with him at all on it? A. No.

Q. You knew that he was out some \$12,000, \$12,220 to you and \$12,600 with the commissions, that that had been paid in February, that you sent him a check in June that arrived about the first of July, June 25th, and so he had the check during the month of July and the month of August and he sent it back to you and you expected him, knowing, too, that your agents had said that he would get \$915; you wrote back to him and told him that \$615 was all he was going to get and you figured that was the settlement?

A. He had the doors, he had the merchandise; he had them since January, and——

Q. And you knew they were worthless, too, didn't you? A. I did not.

Mr. Prendergast: That is all.

Mr. Darling: One question he just brought out.

Redirect Examination

By Mr. Darling:

Q. He said you knew they were worthless. Would these doors have been salable in January of 1948,

(Testimony of J. L. Whitehouse.)

even assuming they were of the description given to them by the plaintiff in this case? [192]

A. They would have been.

Q. Would they have been salable in February of '48? A. They would have been.

Q. And would they have been salable in March of '48?

A. In March the market began to slip. I am not too sure.

Q. How about the summer of '48 from June to September?

A. Again the market was worse.

The Court: That is all. Rebuttal.

Mr. Prendergast: One second. May I check.

(Witness excused.)

Mr. Prendergast: Yes. Cecil Barger, please.

Plaintiff's Rebuttal Testimony

CECIL BARGER

was thereupon recalled as a witness, in rebuttal, in behalf of Plaintiff and, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Prendergast:

Q. Mr. Barger, you have heard the testimony of Mr. McLaughlin of the telephone records, that they indicate he telephoned you on February the 4th. Is that substantially correct now that you have had your memory refreshed?

(Testimony of Cecil Barger.)

A. It could easily be.

Q. And at that time you had received some of the doors back and told him of the defects?

A. Yes, I received the first shipment back on the 2nd.

Q. As you testified before? A. Yes.

Q. Now, you heard the testimony of Mr. Whitehouse that in October when you came out here that you told him that you had for your own purposes set up another sales organization in some other city and hired a man and a hall to try to sell these doors. Is that true?

A. The doors had been, we had made an effort to sell the doors, but not for our purpose. We had no interest from the beginning in trying to sell them for our purpose. They were not our doors. Why would we be interested in fooling with them in the first place? [194]

Q. What did you do? Did you set up another sales organization and hire somebody?

A. We had our salesmen who are out more or less constantly making a special effort in his behalf in view of this settlement, so to speak, that he had finally gotten out of this mill which he claims to have done, making a special effort in his behalf to move the doors allowing just the concession that was indicated per door, or more.

Q. Were you able to sell them? A. No.

Q. Was there any market for them at all?

A. Not through our organization, because we have no contact.

(Testimony of Cecil Barger.)

Q. You also heard the testimony of Mr. Whitehouse in your presence and in your sight that when he asked Ruth Meyer if they paid you \$300 that she nodded her head.

A. I heard him say that?

Q. Is that true?

A. I didn't see her nod her head. I don't even recall the question being asked. I don't know it wasn't, but I don't recall it.

Q. Did she ever pay you or offer to pay you \$300? A. No.

Q. After receiving, along about the first of July, receiving the check of Interstate Lumber Sales, Inc., for \$615, did you consider at any time seriously or otherwise accepting \$615 for [195] your \$12,000 claim?

A. Why, no. It was ridiculous, and I told Ruth on the phone within a day or two after receiving it that it was utterly out of the question, that the settlement wouldn't begin to move the doors. When the thing first happened, back in January, in view of the type—and by this July when the settlement was finally tendered, by the end of June, as Mr. Whitehouse brought out, the market had slipped by the time they finally indicated what their settlement was—three times that wouldn't have begun to interest anyone.

Mr. Prendergast: That is all.

Mr. Darling: That is all.

The Court: That is all.

(Witness excused.)

The Court: Further rebuttal? I will tell you what you gentlemen better do. You better come down another day and talk all morning or all day. You don't have to rush yourselves in a half-hour. That is not a very good way to present a case. Don't you think you better do it that way? Maybe you don't think there is much to talk about.

Mr. Darling: I think there is a lot to talk about, and I think Counsel will agree that the questions of law are almost multitudinous. We would be willing if the Court felt it would be more appropriate to file a written argument on the matter, [196] because I know personally, and I think they know, too, that the amount of enthusiasm or emotional appeal we put in our argument is not going to do any good. It is what we say that will mean something and we feel that——

The Court: It is up to you. Maybe you would like to argue and brief them both.

Mr. Prendergast: Well, your Honor, because of this situation—we do know your docket is in bad shape and they have everything piled on right now——

The Court: I will tell you what you do. You gentlemen come here at 9:00 o'clock in the morning. I don't want to hear a sketchy argument. If you are going to argue, you will want to talk at least an hour on the side. So, you come at 9:00 o'clock in the morning and I will give you an hour on the side.

Mr. Prendergast: May I ask your Honor if we will start the other case at 10:00 or——

The Court: We will start that at 11:00. [197]

May 6, 1949.

Mr. Darling: I move at this time, your Honor, that the case be reopened. I would like to have it reopened for the purpose of placing in evidence two additional exhibits which I think will clarify one or two points.

The Court: Have you seen them?

Mr. Prendergast: Yes, I have seen them, and I have no objection to them going in.

The Court: Admitted.

Mr. Darling: I would like to have them marked. I believe they will be S and T.

(Letter from Ruth Meyer to F. A. Lytle, dated January 10, 1948, so produced, was thereupon received in evidence as Defendants' Exhibit S; and

(Invoice of Austin Dodds Lbr. Co. dated January 15, 1948, so produced, was thereupon received in evidence as Defendants' Exhibit T.)

DEFENDANT'S EXHIBIT S

[Letterhead]

Ruth Meyer

January 10, 1948

Mr. F. A. Lytle
9335 N. Van Houten Avenue
Portland 3, Oregon

Dear Al

This morning you offered me over the telephone

a carload of F82 fir doors in the following assortment:

1000	2.8x6.8	
400	2.0x6.8	
100	2.6x6.8	@\$8.15

Shortly I telephoned Mrs. Lytle and confirmed purchase of this car for shipment to

Barger Millwork Co.

Statesville, N. C.

route if possible GN-CB&Q—Southern Del.

I didn't know whether these doors would be Robinson doors again from Everett, but in any case I am assuming they are standard, up to grade doors. I assured my customer who was very pleased with the last two cars that we could have every confidence in the agent.

Many thanks, Al, and as soon as you tell me where to ship the formal purchase order, I shall send that out.

Sincerely,

/s/ RUTH.

RUTH MEYER.

F. A. LYTLE.

DEFENDANTS' EXHIBIT T

[Letterhead]

Austin Dodds Lumber Company

Date January 15, 1948

Page No. 1

Invoice No. 18

Our Order No. 2358

Price f.o.b. car Del Paso Heights, California

Car No. ATSF-149509

Sold to Ruth Meyer, Davis Building, Portland 4,
Oregon

Shipped to Grand Mfg. Co., Statesville, N. C.

Route SN, WP, DRG, CB&Q Southern Dely.

Terms Net 5 days after arrival.

West Coast Terms and Conditions of Sale to
Govern All Transactions. No Claim Considered Un-
less Made Within 5 Days After Arrival of Car.

Douglas Fir Doors

1,006—2-8 x 6-8 Two Panel Doors.....	8.15	\$8198.90
400—2-0 x 6-8 Two Panel Doors.....	8.15	3260.00
93—2-6 x 6-8 Two Panel Doors.....	8.15	757.95
1—2-6 x 6-8 One Panel Door.....	8.15	8.15
		<hr/>
		\$12,225.00

Invoice in duplicate. B/L attached.

cc: First National Bank of Eugene, Oregon.

F. A. Lytle

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Glenn G. Foster, hereby certify that on Thursday, May 5, 1949, I reported in shorthand certain proceedings had in the trial of the above-entitled cause; that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, consisting of 197 pages, numbered 1 to 197, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said date, as aforesaid, and of the whole thereof.

Dated this 11th day of July, A.D. 1949.

/s/ GLENN G. FOSTER,
Court Reporter Pro Tem.

PLAINTIFF'S EXHIBIT No. 1

[Letterhead]
Austin Dodds Lumber Co.

March 9, 1948
Via Air Mail

Barger Millwork Company
Statesville, North Carolina

Gentlemen:

Quite some time ago we shipped, thru Ruth Meyer, a car load of doors that were evidently not only not up to grade specifications, but were apparently a peculiar type of 2 panel door. You were not satis-

fied with the shipment, and we of course called you direct on it in an effort to ascertain what the reasons were for the claim.

You have probably thought that we have entirely forgotten the matter, but we are dropping you this note to assure you that we are doing all possible to work out a reasonable settlement on the shipment. We are having considerable trouble with the manufacturer in getting him to acknowledge the claim, and in spite of our numerous phone calls to him we have not yet been able to arrive at a basis of settlement. They promised to call us the next day, but this has been going on now for a couple of weeks and we are writing them today in an effort to work out a settlement without allowing this matter to drag on any further. We may or may not get some action on it, but our buyer is now down at Yreka, California, and unless the door factory acknowledges the claim and does so promptly, we will have our buyer go on over to Sacramento and attempt to have the matter settled.

We are quite willing to forgo our commission on these doors in an effort to compensate you somewhat for the car, but we feel that our commission is so small that it would be but a token offering in so far as a settlement was concerned, and for that reason we have been doing our very best to get a settlement from the mill somewhere in the neighborhood of a more satisfactory refund to you than our commission would permit.

Be assured again that we have not forgotten this

claim, nor are we attempting to let it drag out to a point where it would be forgotten. We are reliable shippers, and in the event that we do get a lemon such as this car no doubt is, we always try to do all possible to affect a settlement satisfactory to the customer. We will certainly advise you as soon as we have a definite answer here.

Thanks very much for being very patient with us, and we will certainly want to do the right thing by you.

Yours very truly,
AUSTIN DODDS LUMBER
COMPANY,
/s/ S. P. McLAUGHLIN.

nw

cc: Ruth Meyer

PLAINTIFF'S EXHIBIT No. 4

[Letterhead]

Interstate Lumber Sales—Successor to
Austin Dodds Lumber Co.

June 25, 1948

Check #312

Date: June 25, 1948.

Amount: 615.00.

Signed: S. P. McLaughlin, Interstate Lbr. Sales.
Barger Millwork Company
Statesville, North Carolina

Gentlemen:

We refer to car AT&SF-149509 shipped to you

on January 15th, that contained 1500 Fir doors. This car was covered by our invoice #18 and our order #2358. The car was sold to you thru Ruth Meyer at Portland, Oregon.

You filed a claim on this car of doors stating that they were not of first class manufacture, they were not of the standard pattern, and that the grades on those doors were very much off the represented grade. In our exchange of correspondence we told you that we would endeavor to work out a settlement of some kind and that we would continue to work on this claim until we reached the best settlement we could make on this end.

It has taken considerable time and has been expensive, and the results have not been too satisfactory, but under the circumstances it is the best we have collectively been able to do. We sent our representative into Sacramento in an effort to bring about a settlement of this car. The Grant Manufacturing Company made the doors, gave us the run around every time we attempted to settle the account over the phone and by letters we finally decided that we would have the representative of the Company go down to Sacramento and attempt to personally work out the settlement. It took him 2 or 3 days to get this matter brought to a conclusion and settlement that he got from the Manufacturing Company was taken on the advise of the attorneys at Sacramento. The Company is strictly a small time operation and very, very shaky financially. Management is not good, and the attorney who car-

ried on the work for us at Sacramento told us that it was just a matter of days as to how long the plant would continue in operation. Our representative there looked over the situation very carefully and was very much inclined to agree with the opinion of the attorney and took a check for \$315.00 as a settlement on this shipment. I believe this figure was arrived at on a basis of 30c a door on 70% of the doors but regardless of the basis of settlement it was all the money that he could get out of the Company and after seeing the plant first handed and looking over the situation was inclined to believe that we were fortunate in getting that much out of them. They stalled our representative until after the Bank closed and then gave him a check. He could not wait over to ascertain whether or not the check was good and as he felt the whole situation was very, very shaky we deposited the check about 2 weeks ago and asked that the paying Bank notify us whether the check was good or not good. Evidently this request went astray as we have not heard of the fate of the check but have assumed that sufficient time has elapsed to have allowed the check to have been returned to us in the event that it was no good.

We feel responsible for this shipment and realize that you have a tough problem on your hands in trying to dispose of this stock. We have always stood behind our shipments and have always endeavored that in the event of a claim on any of our cars, have always tried to work out settlement with

the customer that is both fair and reasonable. Ruth Meyer who handled this order for you in Portland is of the same opinion and she too has agreed to put up \$300.00 as her contribution in making up a settlement to you. The settlement that we got direct from the Manufacturing Company, was the refund by Ruth Meyers, plus our \$300.00 will make you a refund of \$915.00 on this particular shipment. This amount will pay the freight on the car and give you some rebate on the doors.

We have enclosed our check for \$615.00 and Ruth Meyers will forward you her own check for her share of this adjustment.

We very, very much appreciate the cooperation you have given us and we appreciate the fact that you realize that such cases as this where the mill is not reliable it is most difficult to work out any kind of a settlement.

We trust that this settlement meets with your approval and that you will permit us to again quote on some of your requirements. We may be able to overcome any additional loss you might have on these doors by getting you some stock from time to time at our cost.

Yours very truly,

INTERSTATE LUMBER
SALES, INC.,

/s/ S. P. McLAUGHLIN.

SPM:caw

cc: F. A. Lytle

Ruth Meyers

PLAINTIFF'S EXHIBIT No. 5

[Letterhead]

Interstate Lumber Sales—Successor to
Austin Dodds Lumber Co.

May 17, 1948

Interstate Lumber Sales

Yreka Inn

Yreka, California

Dear Bill:

We will attempt to give you synopsis of what has gone on regarding that car of doors that we shipped out of the Grant Manufacturing Company to the Barger Millwork Company at Statesville at North Carolina and on which a complaint has been filed.

There is no doubt as to the customers right on this complaint as the stock was not what it was supposed to be.

In order that you can more or less review the situation we have enclosed a copy of our order to the Grant Manufacturing Company, their original invoice and on this please note they have marked 2% B doors and a copy of our invoice to the customer as well as a copy of the order we took from Ruth Meyer.

The doors were represented to Lytle as F82 Fir Doors and that they would not run over 2% B grade. In the first place they were not F82 doors. They were instead a 2 panel door but not a stock item. From what information we have been able to gather they had very, very narrow styles and rails. In

other words they were not a standard pattern F82 door. In the second place the customer stated that 60 to 70% of the doors might by wide stretch of imagination grade out B grade and there were a considerable number of doors that would grade C and D. He said that on close inspection one might find a few A doors. In regards to the manufacture he further stated that the lock rail was centered on the panel and the rail was only 4" wide instead of the approximately 8" of the standard door. We talked to him on the phone and he told us that he just didn't know where he would sell them unless he could get some contractor to take these doors and put them in a bunch of houses. In other words being as they are not stock items they cannot be used as replacements nor can they be sold very readily to the ordinary trade. The millwork company has been exceedingly nice about this lousy shipment and I have tried from here, both by wire and by phone, to get some settlement from the Grant Manufacturing Company. My efforts have resulted in nothing. I even tried to scare them into making a settlement but I got no where.

In attempting to make a settlement on these I asked for a dollar per door rebate and figured that we could probably get back a quarter from Ruth Meyer per door which would at least pay the guy his freight on his load of junk and give him about four bits a door to lop off the price. I talked to Don Moore at the Grant Manufacturing Company who was supposed to have taken the matter up with the board of directors or whatever characters run

the place and call me back. He didn't. After a reasonable length of time I dropped him a wire that went unanswered and a little later called and talked to Mr. Craig. He gave me the same "stall" and the net result is we have gotten no where. If you want anymore dope on this you might check with me on the phone before you go down there and if you are bigger than Moore, which I think you are, and Grant isn't too big you might scare them into coming clean. Incidentally any settlement we make will be to some advantage. The enclosed papers are for your information and in as much as they practically wipe out the file on this particular order, please take good care of them and return them when you're done with it. Please don't go over to Sacramento without having this whole deal pretty well in mind as I think we're only going to get one strick at them and we're done. You can kind of mull these papers over and whatever other information you get you can call and then when you go down there you'll have the whole situation in a nut shell. My own personal opinion on this is an open case of fraud on the grades alone not considering that the doors were not stock F82.

Yours very truly,

INTERSTATE LUMBER
SALES,

/s/ MAC,

S. P. McLAUGHLIN.

SPM:caw

PLAINTIFF'S EXHIBIT NO. 13

February 24, 1948

Mr. J. C. Hendrickson
Austin Dodds Lumber Company
100 Lumbermen's Exchange Bldg.
Eugene, Oregon

Dear Mr. Hendrickson:

I appreciate the fact that you are making every effort to get the matter of the carload of California doors settled. The time is stretching out, and my customer with \$14,000 tied up is being extremely inconvenienced. In consideration of the amount involved I would be very glad if you would push the matter so that we can get it settled without further delay.

Thank you very much for your courtesy in this matter.

Sincerely yours,

/s/ R. M.

RUTH MEYER.

RM/de

cc: Mr. C. K. Barger

PLAINTIFF'S EXHIBIT NO. 16

[Letterhead]

Ruth Meyer — Wholesale Lumber

March 5, 1948

Austin Dodds Lumber Company
100 Lumbermen's Exchange Bldg.
Eugene, Oregon
Attention: Mr. McLaughlin

Dear Mac:

My customer, the Barger Millwork Company, Stateville, North Carolina, is rightfully becoming impatient and concerned at the delay in settling their claim on the car of doors shipped to them in January. I think also that they have been forced to tie up a considerable amount of capital through no fault of their own for too long a time. While we appreciate the fact that you have a very busy office, we also would appreciate your pushing this matter to conclusion at once. Frankly the financial burden which has been placed on my customer at a time when they must consider further buying would be unbearable for an even larger outfit.

May I have your prompt advice.

Very sincerely yours,

/s/ RUTH MEYER,

RM/de

cc: Barger Millwork Co.

F. A. Lytle

DEFENDANT'S EXHIBIT A

[Letterhead]

Interstate Lumber Sales, Inc.

September 23, 1948

Barger Millwork Company
Statesville, North Carolina

Dear Mr. Barger:

This acknowledges your letter of September 13th, 1948 and return of our check #312 for \$615.00.

It will be a real pleasure to meet you when you visit the West Coast and we want you to know that we are looking forward to your arrival. We hope it will be possible for you to spend a little time out here and get acquainted with our great country and its people.

We regret very much the trouble you have had with the car of doors shipped you last January. We do not know how you operate and certainly do not want to cast any reflection upon your method of doing business. Considering the scarcity of doors the first half of this year, we do wonder, whether you have exercised all possible means of disposing of these doors. It seems rather strange that some housing project could not have used these doors long before this.

Considering the length of time since the car was shipped we doubt very much if there is any possible recourse against the mill. Considering also, that we have heard nothing further from you for the past 3 months as to the acceptance of our settlement we

naturally assume that the settlement made was satisfactory. After this long delay, we cannot see now how it is possible for us to do more than we have already done.

For the above reason we are forced to take the attitude that there is little more for us to do and consequently we return our check #312 in the amount of \$615.00.

Cordially yours,
INTERSTATE LUMBER
SALES, INC.,

/s/ J. L. WHITEHOUSE.

JLW:caw

cc: Ruth Meyer

DEFENDANT'S EXHIBIT B

[Letterhead]
Barger Millwork Co.

September 13, 1948

Mr. S. P. McLaughlin
Interstate Lumber Sales, Inc.
100 Lumbermen's Exchange Bldg.
Eugene, Oregon

Dear Mr. McLaughlin:

Sometime ago we received your check for \$615.00, which you offered in settlement of the claim we made on the car of doors you shipped us through Ruth Meyer. After receiving the settlement you

offered, which information we had waited on for several months, we made an effort to move the doors, allowing our customers the approximately 61c off per door that you were allowing us. This did not move the doors at all, so we tried offering them at our net cost, with the additional 61c off but this still did not move them. It seems that the dealers are just not interested in stocking an off-standard door, except possibly at a give-away price.

During the past two months or more since we received your offer, we have tried every method at our disposal to move these doors and we still have 1368 of them in stock; 960—2-8 x 6-8, 380—2-0 x 6-8 and 28—2-6 x 6-8. We feel that we have done everything that you might reasonably expect of us to clear this matter up to the satisfaction of everyone concerned and having failed, we are returning your check for \$615.00 as being an unsatisfactory settlement of our claim and are holding the remaining 1368 doors for your account and for disposal as you see fit. Our attitude in this matter is that we ordered standard F-82 doors and did not receive what we ordered and while we did not feel particularly obligated, we have made a considerable effort to work the problem out for you.

The writer plans to make a trip to the coast within the next three or four weeks, at which time it is hoped we can work this out to a satisfactory conclusion. In the meantime, we hope that you will

find a way to dispose of the doors and we assure you that you will have our continued cooperation.

Sincerely,

/s/ C. K. BARGER.

cc: Ruth Meyer

DEFENDANT'S EXHIBIT C

[Letterhead]

Barger Millwork Co.

March 13, 1948

Mr. S. P. McLaughlin
Austin Dodds Lumber Co.
100 Lumbermen's Exchange Bldg.
Eugene, Oregon

Dear Mr. McLaughlin:

We have your letter of the 9th. with reference to the claim on the car of doors and we are glad to know just what is being done in an effort to settle this claim. We have made considerable effort in our territory to sell some of these doors so that we might be able to determine about what price we could expect them to bring, as against our cost on them after a settlement had been made. So far, we have been unable to move any of them and the complaint is always the same; they do not match the doors in the dealers stock, or in the case of our efforts to move them to Contractors with housing projects, they are not the type door that has been specified or else the quantities we have do not work

out to their requirements and they can't mix them on the job with regular F-82. The design of the doors has been the drawback, with the grade only of slight consideration. Frankly, we are beginning to wonder what we will ever do with the doors, even if we should get them at a considerably reduced price. We paid \$8.40 net for the doors, FOB the Coast and we have just received shipment on a car of doors from Tacoma at an average price of \$6.75 on the Standard make-up F-82, FOB Tacoma; which certainly does not make us feel any better concerning the outcome of this settlement.

We hope that we are not painting too dark a picture. Maybe the hoped-for Spring rush will develop and the customers will come in and take them away from us. (We hope)

We will not continue to worry you about this matter with our letters but we would appreciate it if you would drop us a line occasionally and let us know what progress you are making. We realize that a mill who would ship doors like these will be hard to collect from, but of course we are looking to you, through Ruth Meyer, for our settlement.

We have a customer who builds walk-in refrigerators and he is in the market for a car of approximately 30,000 BFt. #1 Common Fir 2" x 4", kiln-dried to 8% moisture content, S4S to 15/8" x 35/8", 10'-12'-14' and 16' lengths. He wants good material and we want to ship the top end of the grade, at a little higher price if necessary. This customer is particular and I don't want to be left with a car

of lumber on my hands. Would you care to quote us on this car? If so, let us have your quotation as soon as possible, giving us an approximate shipping date.

Sincerely,

/s/ C. K. BARGER.

DEFENDANT'S EXHIBIT F

[Letterhead]

Ruth Meyer — Wholesale Lumber

Austin Dodds Lumber Co.

100 Lumbermen's Exchange Bldg.

Eugene, Oregon

Att: Mr. J. C. Hendrickson

February 7, 1948.

Greetings

Thank you very much for your letter of the 15th. I appreciate your prompt attention to these claims and am confident we shall have satisfactory settlement of both.

I shall look forward to hearing about final disposition.

Sincerely yours,

/s/ RUTH MEYER.

DEFENDANT'S EXHIBIT G

February 5, 1948

Ruth Meyer
Davis Building
Portland 4, Oregon

Greetings:

* * *

In regard to the car of doors. Mr. McLaughlin has today called both the manufacture, and Mr. Barger of the Barger Millwork company, and has heard both sides and has stated that this claim will be brought to a speedy conclusion, probably tomorrow. If and when this is accomplished, we will let you know immediately the outcome.

Very truly yours,

AUSTIN DODDS LUMBER
COMPANY,

J. C. HENDRICKSON.

cc: F. A. Lytle
JCH:nw

DEFENDANT'S EXHIBIT H

[Letterhead]

Ruth Meyer — Wholesale Lumber

Austin Dodds Lumber Co.

100 Lumberman's Bldg.

Eugene, Oregon

Att: Mr. Hendrickson

January 31, 1948

Dear Mr. Hendrickson

In acknowledgment of my purchase order #184 to you covering 1500 Douglas Fir Doors F82 to be shipped to Statesville, N. C. you sent me your order acceptance #2358.

I assume that in acknowledging the order for F82 doors and stating Grade "A", allowing up to 2% "B", you had such assurance from the mill and therefore are protected in the claim now facing us from the customer.

He received a two panel door, but not F82's, the lock rail was centered on the panel and the rail was only 4" wide instead of the approximately 8" of the standard door. Furthermore the doors were about 60 to 70% B with a considerable number of C & D with large knots and obvious defects.

The customer went to considerable expense having shipped them direct to his dealers and he has had to call them in. Rather than send back a complete car, he is willing to talk in terms of settlement which will allow him to move the doors although not what the territory normally uses. I asked him

to suggest what he thought would be a fair refund. He is leaving it to us work this out.

In view of the fact that the amount of money tied up in a carload of doors is so large, I would appreciate prompt action on this particular claim. Will you please advise the first of the week what disposition you can get?

Very sincerely yours,

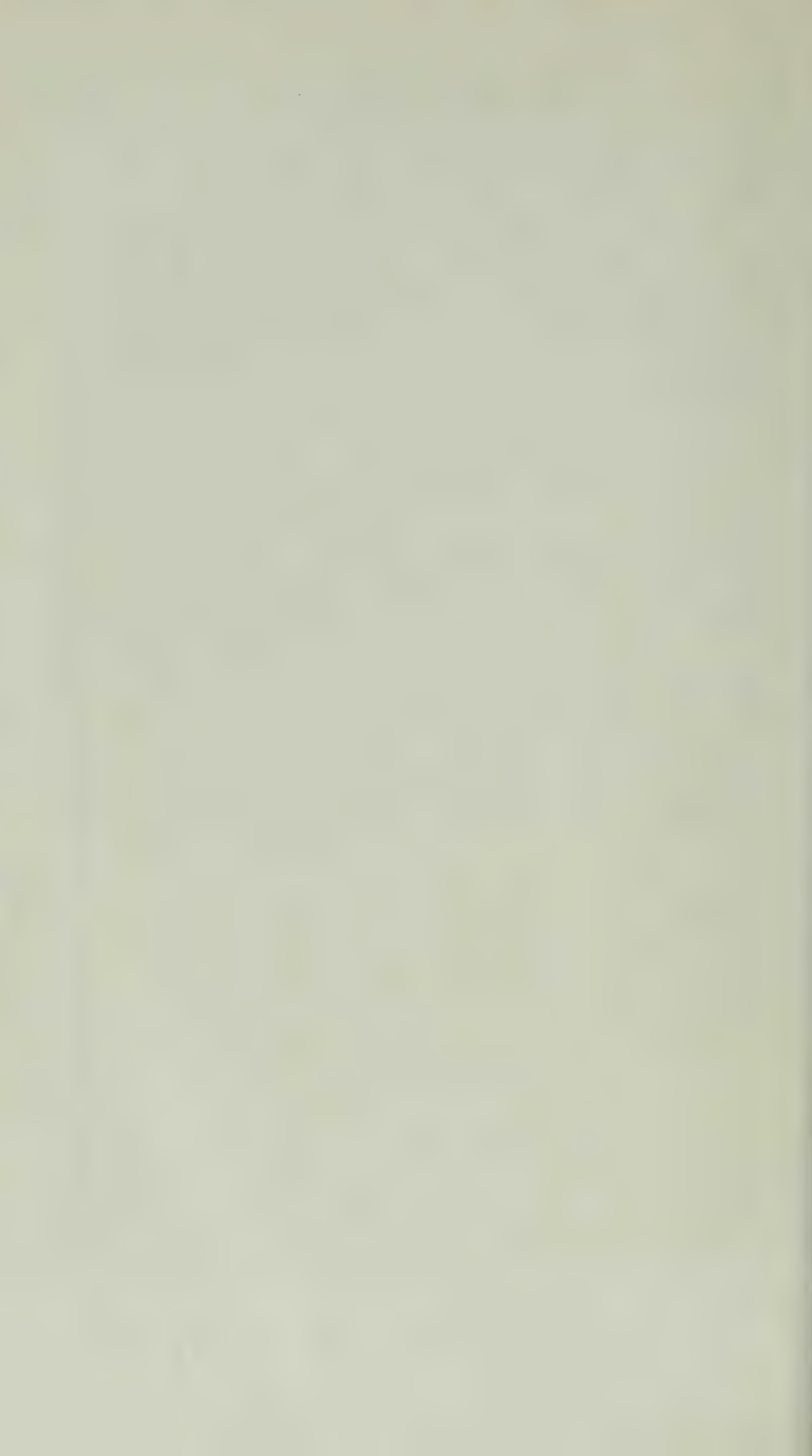
/s/ RUTH MEYER.

**PAY
TO THE
ORDER OF**

TO

CUSTOMER'S DRAFT

TO



DEFENDANTS EXHIBIT I

No. 312

98-17
1232INTERSTATE LUMBER SALES
100 LUMBERMEN'S EXCHANGE BUILDING
EUGENE, OREGON

EUGENE, ORE. June 25, 1948


PAY
TO THE
ORDER OF

BARGER MILLWORK COMPANY

\$ 615.00

THE SUM * * 615 DOLS 00 CTS

DOLLARS

TO  **First National Bank**
Eugene, Ore.

INTERSTATE LUMBER SALES, Inc.

BY

R. P. McLaughlin

DEFENDANTS EXHIBIT K

CUSTOMER'S DRAFT

06-17 THE FIRST NATIONAL BANK 06-17

EUGENE, OREGON, January 15, 1948

At Sight

PAY TO THE

ORDER OF FIRST NATIONAL BANK of EUGENE, OREGON

\$ 12,225.00

TWELVE THOUSAND TWO HUNDRED TWENTY FIVE AND NO/100-----DOLLARS

VALUE RECEIVED AND CHARGE TO ACCOUNT OF

WITH EXCHANGE

AUSTIN DODDS LUMBER CO.

To Ruth Meyer
Bank of California
Portland, Oregon

By: _____

DEFENDANT'S EXHIBIT N

[Letterhead]

Ruth Meyer — Wholesale Lumber

March 25, 1948

Mr. C. K. Barger

Barger Millwork Company

Statesville, North Carolina

Dear Cecil:

Can now ship #1 KD certigrade shingles on association weights at \$10 a square. If your market requires any at the present time, let me know.

I talked with Austin Dodds yesterday, and they didn't give me any information beyond what they wrote you except that they are working on the basis of trying to recover a dollar a door. However, they just came through with settlement of another claim so I'm hoping yours will follow quickly.

With best regards,

/s/ RUTH,

RUTH MEYER.

RM/de

DEFENDANT'S EXHIBIT O

[Letterhead]

Barger Millwork Company

March 30, 1948

Miss Ruth Meyer
Davis Bldg.
Portland 4, Oregon

Dear Ruth:

We have received several letters from you which we have failed to answer for one reason and another, (mostly procrastination), but we feel that the time has now come for us to let you know that we are not really dead but just in a state of dormancy. However, with a week or two of good weather just past and prospects of more to come, there are some signs of activity with the dealers. Most of them have fair stocks but it won't be long until they begin to draw on our stock and that will certainly be a help. We have doors spilling out at every opening. At the present time, we have in this one small warehouse about six cars of doors, two cars of windows, most of the car of Fir lumber you shipped me, about a car and a half of Fir moulding and numerous other odds and ends.

Concerning the shingles mentioned in your last letter, we have had no calls for shingles since last Fall and we are told that the demand is usually heaviest at that time. For that and other reasons, we will probably not want shingles until later in the year but we will keep them in mind.

We have heard nothing from Austin Dodds since their letter three or four weeks ago but there is very little to do but wait for them to work out settlement with the mill. We are still unable to move any of these doors but frankly, I think that they will move when the market becomes active and demand gets a little beyond the ability of the mills to supply. This will probably not happen until about July or August but I can see very little to do but wait. We can't even give them away now and I believe I can hold them and pick up a little on them later.

Please keep everything under control on the coast. I'd hate to wind up out there this Summer and find everything out of hand.

Sincerely,

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss:

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, answer of Austin Dodds, answer of Interstate Lumber Sales, Inc., answer of J. L. Whitehouse, pre-trial order, memorandum decision, findings of fact and conclusions of law, judgment, notice of appeal, undertaking on appeal, statement of points, designation of contents of record, stipulation for order, and order to send original exhibits, transcript of docket entries, and this certificate, con-

stitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4320, in which P. M. Barger Lumber Co., a corporation doing business under the name and style of Barger Millwork Company, is plaintiff and appellant, and J. L. Whitehouse, an individual doing business under the assumed name and style of Interstate Lumber Sales, and Interstate Lumber Sales, Inc., is defendant and appellee; that the record has been prepared by me in accordance with the designation of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate transcript of proceedings dated May 5, 1949, filed in this cause, together with exhibits, Plaintiff's 1 to 18 inclusive, and Defendants A to C, F to T inclusive.

I further certify that the costs on this appeal amounting to \$5.00 have been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 29th day of July, 1949.

LOWELL MUNDORFF,

Clerk.

[Seal] By /s/ F. L. BUCK,

Chief Deputy.

[Endorsed]: No. 12315. United States Court of Appeals for the Ninth Circuit. P. M. Barger Lumber Co., a Corporation, Doing Business Under the Name and Style of Barger Millwork Company, Appellant, vs. J. L. Whitehouse, and Interstate Lumber Sales, Inc., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: August 1, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the Circuit Court of Appeals of the United States
for the Ninth Circuit

Civil No. 4320

P. M. BARGER LUMBER CO., a Corporation Doing Business Under the Name and Style of BARGER MILLWORK COMPANY,

Plaintiff-Appellant,

vs.

J. L. WHITEHOUSE, an Individual Doing Business Under the Assumed Name and Style of Interstate Lumber Sales, and INTERSTATE LUMBER SALES, INC., an Oregon Corporation,

Defendants-Appellees.

DESIGNATION OF PARTS OF THE TRANSCRIPT OF THE RECORD TO BE PRINTED

Appellant hereby designates the matters referred to herein as the parts of the record necessary for consideration, as follows:

1. Pre-trial order.
2. Exhibit 1, letter dated March 9, 1948, from Austin Dodds Lumber Company to Barger Millwork Company.
3. Exhibit 3, purchase order dated January 12, 1948, from Ruth Meyer, agent to Austin Dodds Lumber Company.

4. Exhibit 4, letter dated June 25, 1948, from Interstate Lumber Sales, Inc., to Barger Millwork Company.

5. Exhibit 5, letter dated May 17, 1948, from Interstate Lumber Sales to Interstate Lumber Sales, Yreka, California.

6. Memorandum of decision.

7. Findings of Fact and Conclusions of Law.

8. Judgment for defendants; also Notice of Appeal and Clerk's Certificate.

9. Testimony, as follows:

Commencing on Page 5 with the question:

Q. Now, Mr. Barger, do you know one Ruth Meyer?—to Page 7, inclusive.

Commencing on Page 9 with the question:

Q. So that in purchase or sale of fir doors in the wholesale millwork . . .", to Page 12, inclusive.

Commencing on Page 21, with the question:

Q. I believe your testimony was that a week or so before you . . .", down to Page 62, inclusive, and ending at Cross-examination.

Commencing on Page 74, first question, down to Page 83, inclusive.

Commencing on Page 92 to and including Page 97.

Commencing on Page 115, line 3 to line 11, inclusive.

Commencing on Page 127, line 2, down to and including Page 130.

Commencing on Page 133 to and including Page 142.

Commencing on Page 155 to and including Page 178.

Commencing on Page 187 to Page 192, excluding redirect examination.

Commencing on Page 194 to Page 196, excluding remarks of Court and Counsel, re-argument of case.

10. This designation of parts of the record.

/s/ LEO LEVENSON,

Of Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Aug. 4, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED

Appellees hereby designate the following additional parts of the record as material to the consideration of the Appeal in the above case:

1. Exhibit 6. Telegram, Meyer to Barger, dated January 12, 1948.

2. Exhibit 13, also marked as Exhibit E. Letter dated February 24, 1948, from Meyer to Hendricksen.

3. Exhibit 16, also marked as Exhibit D. Letter dated March 15, 1948, Meyer to Austin Dodds Lumber Company.

4. Exhibit A. Letter, Interstate to Barger, September 23, 1948.

5. Exhibit B. Letter, Barger to McLaughlin, September 13, 1948.

6. Exhibit C. Letter, Barger to McLaughlin, March 13, 1948.

7. Exhibit F. Letter, Meyer to Hendricksen, February 7, 1948.

8. Exhibit G. Letter, Hendricksen to Meyer, February 5, 1948 (last paragraph).

9. Exhibit H. Letter, Meyer to Dodds, January 31, 1948.

10. Exhibit I. Check No. 312, Interstate to Barger, \$615.00, June 25, 1948.

11. Exhibit J. Telegram, pencil copy, Barger to Meyer, February 4, 1948.

12. Exhibit K. Sight draft, Copy, First National Bank, Eugene, (\$12,225), January 15, 1948.

13. Exhibit N. Letter, Meyer to Barger, March 25, 1948.

14. Exhibit O. Letter, Barger to Meyer, March 30, 1948.

15. Exhibit P. Black notebook, part of records of Mr. and Mrs. Lytle.

16. Exhibit Q. Invoice of Grant Manufacturing Company dated January 12, 1948, to Austin Dodds Lumber Company.

17. Exhibit R. Sight draft to the order of Grant Manufacturing Company dated January 13, 1948.

18. Exhibit S. Ruth Meyer letter to F. A. Lytle, January 10, 1948.

19. Exhibit T. Invoice of Austin Dodds Lumber Company dated January 15, 1948.

20. Testimony, as follows:

All of the transcript of proceedings in the above case not designated by the Appellant excepting testimony beginning with page 98 to and including the next to the last line on page 103.

21. This Designation of Additional Parts of the Record.

DARLING & VONDERHEIT,

By /s/ STANLEY R. DARLING,

Of Attorneys for Appellee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 15, 1949.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Appellant hereby adopts the statement of points that was filed in the District Court of the United States for the District of Oregon as the points upon which it intends to rely on appeal in this Circuit Court of Appeals.

Dated this 3rd day of August, 1949.

/s/ LEO LEVENSON,

Of Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 4, 1949.

No. 12315

In the United States
Circuit Court of Appeals
For the Ninth Circuit

P. M. BARGER LUMBER CO., a corporation doing
business under the name and style of Barger Mill-
work Company,

Appellant

vs

J. L. WHITEHOUSE and INTERSTATE LUMBER
SALES, INC.,

Appellees

Appellant's Brief

Upon appeal from the District Court of the United
States for the District of Oregon

LEO LEVENSON
W. J. PRENDERGAST, Jr.,
Portland Oregon

Attorneys for Appellant

OTTO F. VONDERHEIT,
STANLEY R. DARLING,
Eugene, Oregon,

Attorneys for Appellees

FILED

DEC 22 1949

PAUL P. O'BRIEN,

CLERK

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

P. M. BARGER LUMBER CO., a corporation doing
business under the name and style of Barger Mill-
work Company,

Appellant

vs

J. L. WHITEHOUSE and INTERSTATE LUMBER
SALES, INC.,

Appellees

Upon appeal from the District Court of the United
States for the District of Oregon

JURISDICTION

This case involves an action for damages for breach of an express warranty, sustained by appellant, a North Carolina Corporation, in the purchase by it of a carload of doors from appellees, residents and citizens of Oregon. The breach of the express warranty related to quality and kind of doors. The amount involved exceeds, exclusive of interest and costs, the sum of \$3000.00. The trial was without a jury. The jurisdiction of the

District Court is conferred by Title 28 U.S.C.A. Sec. 1332. The Pre-Trial Order appears on pages 2 to 11 inclusive of the Transcript of Record.

Memorandum opinion was rendered on May 25, 1949 (R-11) holding that one Ruth Meyer, a missing person, not a party to the case, was the vendor; further, that appellant's course of conduct was inconsistent with rescission. Judgment for appellees was entered June 16, 1949. (R-17)

Jurisdiction of Court of Appeals is conferred by Title 28 U.S.C.A. Sec. 1291.

STATEMENT OF THE CASE

Appellant is engaged in the wholesale warehousing and selling of lumber and millwork, with its business located in Statesville, North Carolina. Appellees Whitehouse and Interstate Lumber Sales, Inc., are engaged in the wholesale lumber business in Eugene and Portland, Oregon. Ruth Meyer, a missing person, (R-111) not a party to the action, was engaged in business as a lumber broker, with her office in Portland, Oregon. (R-23). On January 10, 1948 Meyer telephoned appellant (R-25) (R-41) that there was available a carload of fir doors known to the trade as F-82, which is the brand and description of a two-panel door, specially designed and adopted by the Fir Door Institute, an organization whose established design, grade and quality standards for doors are recognized and ac-

cepted by manufacturers and distributors. (R-25-26) Appellant was interested in this specific type of product and instructed her to purchase it. (R-41). Meyer as agent, or broker, referred the order, Exhibit 3, (R-52) to Austin Dodds Company who was the predecessor (R-142) (R-198) of appellees. There is no dispute that appellees assumed the assets and liabilities of Austin Dodds Company. (R-198-199). Appellant was informed that the car of F-82 doors was rolling along to it, (R-44) and a bill of lading was received indicating that 1500 doors was enroute. The shipper, (R-54) required in advance \$12,600.00 as a guarantee, (R-78) which amount was paid by appellant.

Prior to Meyer's phone call appellant was unaware of the source of these doors and with whom she was to refer the order (R-41). In the interval between receipt of the invoice and the actual arrival of the carload, and without prior inspection, appellant sold the doors to its customers. (R-56). Upon arrival of the freight car, about January 28, 1948 (R-56) the freight charges, about \$1,000.00 was paid by appellant (R-56), and the doors were unloaded and distributed to its customers (R-58). Complaints were immediately received by appellant from its customers that the doors were not of the standard or quality of F-82 (R-58-59) and were being rejected. Appellant thereupon made inspection of the doors (R-60-64) and telephoned Meyer, also telegraphed, (R-59) and lodged its complaint concerning

the breach of quality of the shipment and informed her that customers were rejecting the doors. Subsequently (R-62) McLaughlin in Oregon, an employee or officer of appellees, within a week of the complaint, (R-62-63) telephoned appellant at North Carolina, to ascertain the basis for the complaint and said he would investigate the matter. On March 9, 1948 appellees wrote appellant (R-210) *Exhibit 1*, confirming their knowledge of the complaint relating to the quality of the doors and that they would make an investigation thereof and would communicate with appellant respecting some settlement. Appellees stated:

“... We are reliable shippers and in the event that we do get a lemon such as this car no doubt is, we always try to do all possible to effect a settlement satisfactory to the customer . . .”

Appellant had been instructed to hold the doors (R-66-67) until instructions pertaining to their disposition could be given.

There is no dispute that the shipment of doors was not as expressly warranted and was not the grade and design known as F-82, but was inferior in every respect. In the course of appellees investigation with the factory from whom they purchased these doors, they had written to their buyer, *inter alia*, as follows: *Appellant's Exhibit No. 5*, (R-216)

“... The doors were represented to Lytle as F82 Fir Doors and that they would not run over 2% B

Grade. In the first place they were not F82 doors. They were instead a 2 panel door but not a stock item. From what information we have been able to gather they had very, very narrow styles and rails. In other words they were not a standard pattern F82 door. In the second place the customer stated that 60 to 70% of the doors might by wide stretch of imagination grade out B grade and there were a considerable number of doors that would grade C and D. He said that on close inspection one might find a few A. doors . . . We talked to him on the phone and he told us that he just didn't know where he would sell them unless he could get some contractor to take these doors and put them in a bunch of houses. In other words being as they are not stock items they cannot be used as replacements nor can they be sold very readily to the ordinary trade. The millwork company has been exceedingly nice about this lousy shipment and I have tried from here, both by wire and by prone, to get some settlement from the Grant Manufacturing Co. My efforts have resulted in nothing. I even tried to scare them into making a settlement but I got no where . . .

(R-217)

"In attempting to make a settlement on these I asked for a dollar per door rebate and figured that we could probably get back a quarter from Ruth Meyer per door which would at least pay the guy his freight on his load of junk and give him about four bits a door to lop off the price . . .

(R-218)

"My own personal opinion on this is an open case of fraud on the grades alone not considering that the doors were not stock F-82 . . ."

Interstate Lumber Sales,

/s/ MAC

S. P. McLaughlin

Appellees also had written appellant on March 9, 1948. (R-69) *Exh. 1* advising that they were making efforts to effect a settlement with the manufacturer.

Appellees, on June 25, 1948, represented they had received from the manufacturer a settlement of \$315.00, and, added to that amount, the sum of \$300.00 their alleged profit, (R-212), *Exh. No. 4*, and informed appellant, that the sum of \$615.00 was the best settlement they could offer. (R-73-74) They also stated: "*... We feel responsible for this shipment and realize you have had a tough problem on your hands in trying to dispose of this stock . . .*" (R-73). The truth however was that appellees had made a profit (R-182) in excess of \$1000.00. Appellant rejected the proposed offer of settlement. (R-104). Mr. Barger, appellant's manager, informed appellee he would visit their office in Oregon and discuss the matter which he did in October, 1948 (R-75-104-105) The shipment of doors was valueless to appellant. (R-76) It was not the type or quality of merchandise it marketed, and there was no possible sale in North Carolina. Appellees definitely refused to indicate to appellant (R-77) what it was to do with the shipment and it was therefore necessary to warehouse the same. To this day the shipment is stored in a warehouse in North Carolina.

THE QUESTIONS INVOLVED

1. Were appellees the vendors in the sale of the carload of doors to appellant, as principal, through the agency of Meyer?
2. Was the carload of doors of the grade and quality known as F-82 as warranted by the vendors?
3. Did the appellant have the right of inspection prior to acceptance of the shipment?
4. Did appellant give reasonable notice of its rejection of the shipment as being in violation of the express warranty as to quality?
5. Was there an accord and satisfaction?
6. That the findings of Fact are contrary to and are not supported by substantial evidence and are clearly erroneous.

SPECIFICATIONS OF ERROR

1. The court erred in Finding of Fact VI (R-14) holding that appellees agreed to sell to Ruth Meyer, a wholesale lumber dealer, a carload of F-82 fir doors, which carload at her request was shipped to appellant in North Carolina; in that, said finding is contrary to substantial evidence to the effect that appellees, as vendors, sold the carload of doors to appellant, as principal, through Ruth Meyer as agent.

2. The court erred in Finding of Fact VII (R-14) holding that the doors were purchased from appellees by Ruth Meyer, in her capacity as an independent wholesale lumber dealer, and not as an agent of appellant; in that, said finding is erroneous and contrary to substantial evidence to the effect that Meyer was a lumber broker or agent, and acted in that capacity in purchasing the carload from appellees on behalf of appellant who was either the disclosed or undisclosed principal.
3. The court erred in its Conclusions of Law II (R-15) that neither appellee sold any doors to appellant, and that the only sale of doors was to Ruth Meyer, as principal, and that no contractual relationship of seller and buyer or other contractual relationship existed at any time between appellees and appellant; in that appellees, as vendors, sold and delivered a carload of doors to appellant, as the principal, on an order placed and paid for by appellant, as a principal, through Ruth Meyer, as agent, and that appellees being the vendors, their legal liability for breach of warranty follows as a matter of law.
4. The court erred in its Conclusions of Law III (R-16) that appellant failed to prove any claim for breach of warranty in the nature of rescission

against appellees, and that if appellant has a claim it is against Ruth Meyer or her estate. Appellant contends that all the evidence in the case, is to the effect that appellant as a disclosed principal, ordered through Ruth Meyer, as agent, a carload of doors of the grade or quality known as F-82, and that said carload of doors, sold by appellees, did not contain that grade, or quality specified, but were wholly inferior doors, and upon prompt inspection by appellant, the breach of warranty being obvious, due notice was given to appellees who acknowledged the complaint and assured appellant as purchaser, that consideration would be given it in due course of events after consulting manufacturer.

**(a) APPELLEES, AS VENDORS, SOLD THE DOORS
TO APPELLANT, A DISCLOSED PRINCIPAL, AS
VENDEE, THROUGH THE AGENCY OF MEYER, AS
LUMBER BROKER OR AGENT**

**(b) EVEN THOUGH THE CONTRACT FOR THE
SALE OF THE DOORS IS ASSUMED TO HAVE
BEEN MADE IN THE NAME OF MEYER, AS OS-
TENSIBLE PRINCIPAL, THE REAL PRINCIPAL,
APPELLANT, MAY MAINTAIN THIS ACTION
AGAINST THE VENDOR.**

ARGUMENT

Meyer maintained a 2-room suite in a downtown office building in Portland (R-143). She had no lumber yard. (R-146).

On January 10, 1948, she telephoned Lytle, an employee or officer of appellees, (R-136) and inquired if there were some doors available. Lytle informed her he had a carload and gave her the description and said it was subject to prior sale. She informed him that she would (R-137) endeavor to find a customer. She later placed with appellees the order, *as agent. Exhibit 3.* (R-52) Appellees were informed that the customer was appellant. (R-145) (R-146) Appellees did not have the carload on hand, but they, as wholesalers, knew where it could be obtained. (R-148). As soon as Meyer placed the order, appellees, contacted the manufacturer (R-164) and on January 12, 1948, Exhibit Q, an invoice was issued and a draft drawn wherein appellees purchased a carload of doors. (R-166) *Appellees extended no credit to Meyer and insisted upon a guarantee,* (R-78) *which guarantee she obtained from appellant, and, upon confirmation of the guarantee,* appellees endorsed the order bill of lading which controlled the content of the carload of doors. (R-175) In other words Meyer had no credit standing with appellees and the only method of payment was by the medium of drafts, the appellant guaranteeing the payment.

During all this time the carload was en route from the manufacturer to Statesville, North Carolina, with appellees as the consignee. (R-180) The carload at the time of shipping, was not to be delivered to appellant, where it was destined, until the bill of lading was delivered to the railroad company. (R-180) *The title to the shipment was in appellees* (R-181) until January 19, 1948 when the draft was honored.

The above evidence, we submit, makes it inescapable that Meyer, as agent, for a disclosed principal, the appellant, ordered from appellees, as vendors, a carload of F-82 doors. The law is well established that a principal is entitled to maintain an action upon a contract made by his agent with a third person.

This rule is found in 2 *Am. Jur. Sec.* 388, page 304:

"One who contracts with a duly constituted and authorized agent acting on behalf of a disclosed principal, where the principal is named as the contracting party, is bound by the contract and liable on it to the principal to the same extent as if he had contracted with the principal in person. A principal by ratification may also enforce a contract entered into by one assuming to act in his behalf, but without authority. According to the American Law Institute, the liability of a third person to a disclosed principal is not affected by rights which he may have against the agent . . ."

The *Restatement of Law of Agency*, Section 292, page 658, also supports the above principle as follows:

"The other party to a contract made by an agent acting within his power to bind a disclosed or

partially disclosed principal is liable to the principal as if he had contracted directly with the principal, unless the principal is excluded as a party by the form or terms of the contract."

Appellees, by their counsel, acknowledge that Meyer was the agent of appellant. (R-110)

Appellant dealt with Ruth Meyer in her capacity as a lumber broker or agent, and not as a wholesaler (R-42). Appellant knew that she did not own nor manufacture the doors, and that her interest was solely as a broker, on a commission basis.

Appellees, however, occupied a different position. They actually owned the doors. Their letterhead, too, indicated that they were in the lumber business. (R-209-210-212-215-216-221-227). Prior to the sale of this particular shipment, appellees had sold to appellant as principal, through Meyer, other doors described as of the grade F-82. These doors had been obtained by appellees from an unknown source (R-143). Appellees informed Meyer (R-144) they had for sale a second carload of *grade F-82* doors and that is the carload represented to be the same as the previous one. They at no time disclosed the source of their supply. *They knew she was not purchasing doors for her own account, but for the account of another, on a commission basis.* (R-145) They knew she was acting as an agent or broker and that appellant, as principal, was the customer. (R-146) They knew she had no lumber

yard nor warehouse, and that her place of business was only a two-room suite in a downtown office building in Portland. (R-142).

There is a well-defined distinction between a broker and a wholesaler. A wholesaler buys for himself and a broker buys or sells for someone else (R-116). *Exh. Q*, (R-166), supports the viewpoint that appellees were the owners of and had title to the carload of doors. They had purchased the doors on January 12th, 1948, from the manufacturer (R-179). *They forwarded this carload direct to themselves in North Carolina* on an order bill of lading. (R-180) Meyer never at any time had the doors in her possession, and, there is no competent evidence that she was purchasing the doors for herself, as principal. *The title to the doors*, from the time they left the factory, until they reached North Carolina, *was in appellees*. Meyer as an agent or broker was only the instrumentality for obtaining an order from appellant and the purchase price to be remitted to appellees.

“As generally defined, a broker is an agent who, for a commission or brokerage fee, bargains or carries on negotiations in behalf of his principal as an intermediary between the latter and third persons in transacting business relative to the acquisition of contractual rights, or to the sale or purchase of any form of property, real or personal, the custody of which is not intrusted to him for the purpose of discharging his agency. . . ”

Promptly upon discovery of the breach of warranty appellant contacted Ruth Meyer, (R-59), and she immediately informed appellees of their breach of warranty and *they assumed all responsibility in connection with the sale* and agreed to make an investigation. (R-62-63) They directed a letter to appellant, reading, *inter alia*, as follows: (R-210) *Exh. 1*.

“Quite some time ago we shipped, through Ruth Meyer, a carload of doors that were evidently not only not up to grade specifications, but were apparently a peculiar type of 2-panel door. You were not satisfied with the shipment, and we of course called you direct on it in an effort to ascertain what the reasons were for the claim. . . .

“Be assured again that we have not forgotten this claim, nor are we attempting to let it drag out to a point where it would be forgotten. *We are reliable shippers*, and in the event that *we do get a lemon such as this car no doubt is*, we always try to do all possible to affect a settlement *satisfactory to the customer*.”

We further respectfully refer the court to *Exh. 4*, (R-212) wherein appellees wrote appellant, *inter alia*, as follows: (R-213)

“ . . . The car was sold to you thru Ruth Meyer at Portland, Oregon . . .

“*We feel responsible for this shipment* and realize that you have a tough problem on your hands in trying to dispose of this stock. We have always stood behind *our shipments* and have always endeavored that *in the event of a claim on any of our cars*, have always tried to *work out a settlement with the customer* that is both fair and reasonable. Ruth Meyer who handled this order for you

in Portland is of the same opinion and she too has agreed to put up \$300.00 as her contribution in making up a settlement . . .

“We trust that this settlement meets with your approval and that you will *permit us to again quote on some of your requirements.*

That the status of Meyer was that of an agent for Appellant and *not the vendor*, is fully supported by an authority squarely in point with the case at bar. *Larson vs Inland Seed Co.* 143 Wash. 557, 255 Pac. 919. Larson was a farmer, residing some distance north of Spokane. Washington. Inland Seed Company had its place of business in Spokane. Garden City Feed Mills was located at Walla Walla. Larson placed an order with the seed company for a quantity of seed spring rye. The seed company referred the order to the feed mills which order was filled without passing through the possession of the seed company. The theory upon which a recovery of damages for breach of warranty was asserted, was based on the contention that the seed company and feed mill were joint vendors. The trial court disposed of the case on the theory, *that the seed company, who took the order, was in legal effect only the agent of Larson in ordering the spring rye from the feed mills. It was further held to be of immaterial consequence that the check for payment was sent by the customer through the agent.* The court affirmed the case and stated:

“As to the claimed liability of the seed company to Larson it seems to us that the agreement or contract if it is desired to so characterize the understanding arrived at between Larson and the seed company by that more strict legal term we think imposed upon the seed company no other or greater duty than to order for Larson from the feed mills 1,500 pounds of spring rye, with directions to ship the rye direct to him at Loon Lake; in other words, it seems to us that there did not accompany that agreement any guaranty, express or implied, on the part of the seed company that the feed mills would ship spring rye to Larson. *This we think is rendered fairly plain by the fact that Larson well understood that the rye was to be furnished and shipped to him by the feed mills without the seed company having anything further to do with the furnishing of the rye.* It is not claimed as we understand counsel for Larson, that the seed company did not plainly direct the feed mills to furnish and ship spring rye to Larson. It is true that Larson after receiving the rye, sent his check to the seed company for an amount equal to the purchase price, but that does not change the agreement between Larson and the seed company so as to impose upon it any other duty than to send the check or its proceeds to the feed mills or return it to Larson. It seems, therefore, though of no consequence here, that the sending of the check by Larson to the seed company has ultimately resulted in the feed mills being paid for the rye. If the seed company had taken no steps looking to the shipping of the rye to Larson, it seems to us that Larson could not have recovered from the seed company in damages upon the ground of breach of a sale contract made by the seed company with him. We conclude that the evidence introduced upon the trial in behalf of Larson does not show any right of recovery against the seed company.

Considering now *the claimed liability of the*

feed mills to Larson, we shall look upon them as the vendors selling the rye to Larson, which is the logical result of what we have said touching the claimed liability of the seed company to Larson, and the most unfavorable position in which the feed mills can be placed with reference to their liability to Larson. The feed mills are in the position of receiving an order for the spring rye from Larson through the seed company. We have seen that, in response to such order, the feed mills, without communication from or to Larson, shipped to him the 1,500 pounds of rye, as directed by the seed company, except that the shipped rye later proved to be fall rye, and that Larson accepted the rye, at the same time seeing the feed mills' disclaimer of warranty attached to each bag; . . . " (emphasis added)

The rule has been announced that *courts look beyond names to ascertain the real nature of the transaction* in order to ascertain whether a party is a buyer or occupies the relationship of an agent.

"The primary test of whether a particular contract or transaction whereby goods are delivered or shipped by one party to another for sale by the latter creates the relation of buyer and seller or only a relation of principal and agent is *the intention of the parties to be gathered from the whole scope and effect of the language used, and mere verbal formulas, if inconsistent with the real intention, are to be disregarded*. It does not matter by what name the parties chose to designate it. *That does not determine its character. The courts look beyond mere names and within to see the real nature of the agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties, or from some isolated provision, its legal*

character and effect . . . The fact that one's commission is to be a percentage of the profits does not necessarily change his character as an agent . . . ,”

46 *Am. Jur. Sec. 17*, page 211

Even though the position may be taken that the contract for the sale of the doors was made with Meyer as ostensible principal, appellant, *as the real principal*, may maintain this action for breach of warranty.

The law is well established, *that the real principal may at any time appear in his true character and claim all the benefits of the contract from the other contracting party.*

In support of the above contention, we quote 2 *Am. Jur. Sec. 410* at page 320:

“When an agent makes a simple contract for his principal, but, contracting as if he were the principal, conceals the fact that he is an agent, the principal may at any time appear in his true character and claim all the benefits of the contract from the other contracting party, so far as he can do so without injury to that other by the substitution of himself for his agent. It has been held that any benefit or advantage derived by the agent in the nature of a warranty, either express or implied, inures to the benefit of the undisclosed principal . . . On a sale of personal property by parol or by writing not under seal, it is not infrequent that the title vests, not in the apparent purchaser, but in some undisclosed principal for whom the apparent purchaser was negotiating as agent, and the authorities show that the real purchaser, though unknown to the seller, may vindicate by suit in his own name his rights in the prop-

erty, provided that the seller or party dealing with the agent is not prejudiced by the introduction of the unknown principal in place of the agent . . . ”

Though a principal to a contract may desire to remain undisclosed and act through an agent, it is a familiar rule that an undisclosed principal may sue upon the contract made by his agent to the same extent as if his relation to it were known at the time it was entered into.

The case of *Kelly Asphalt Block Company vs Barber Asphalt Paving Company*, 211 N. Y. 68, 105 N. E. 88 L.R.A. 1915C page 256, is squarely in point in support of the above principal, and in practically every aspect is apposite to the case at bar. In that case plaintiff sued to recover damages for breach of an implied warranty. The contract was made between the defendant and one Booth. Plaintiff says that Booth was in truth its agent, and sues as undisclosed principal. The question is whether it has the right to do so. The evidence disclosed that plaintiff and defendant were competitors in business. The plaintiff's president suspected that the defendant might refuse to name him a price. There was no basis however for his suspicion. Because, though, of his doubt the plaintiff availed itself of the services of Booth, who, though interested to the defendant's knowledge in the plaintiff's business, was also engaged in a like business for another corporation. Booth asked the de-

fendant for a price and received a quotation, and the asphalt blocks required for the plaintiff's pavement were ordered in his name. The order was accepted by defendant, the blocks were delivered, *and payment was made by Booth with money furnished by the plaintiff.* The paving blocks were unmerchantable, and the defendant, retaining the price, contests its liability for damages on the ground that if it had knowledge that the plaintiff was the principal, it would have refused to make the sale.

Justice Cardozo, who wrote the opinion, concluded:

"We are satisfied that upon the facts before us the defense cannot prevail. A contract involves a meeting of the minds of the contracting parties

.....

"The defendant was contracting with the precise person with whom it intended to contract. It gained whatever benefit it may have contemplated from his character and substance . . . An agent who contracts in his own name for an undisclosed principal does not cease to be a party because of his agency . . . Indeed, such an agent, having made himself personally liable, may enforce the contract though the principal has renounced it . . . As between himself and the other party, he is liable as principal to the same extent as if he had not been acting for another. It is impossible in such circumstances to hold that the contract collapses for want of parties to sustain it . . . If Booth had given the order in his own right and for his own benefit, but with the expectation of later assigning it to the plaintiff, that undisclosed expectation would not have nullified the contract. His undisclosed intention to act for a principal who was unknown to the defendant was equally ineffective to destroy

the contract in its inception . . .”

Justice Cardozo, concluding that Booth made no misrepresentations to the defendant, continued with the opinion, and said:

“The validity of the contract turns thus, according to the defendant, not on any overt act of either the plaintiff or its agent, but on the presence or absence of a mental state. We are asked to hold that a contract complete in form becomes a nullity in fact because of a secret belief in the mind of the undisclosed principal that the disclosure of his name would be prejudicial to the completion of the bargain. We cannot go so far. It is unnecessary, therefore, to consider whether, even if fraud were shown, the defendant, after the contract was executed, could be permitted to rescind without restoring the difference between the price received for the defective blocks and their reasonable value. It is also unnecessary to analyze the evidence for the purpose of showing that the defendant, after notice of the plaintiff’s interest in the transaction, continued to make delivery, and thereby waived the objection that the contract was invalid.

The case was affirmed on the general principle, *that a contract made in the name of an agent as ostensible principal, may be sued on by the real principal at the latter’s election.* And that is precisely the problem presented in the case at bar. All the evidence in the case established that Meyer was required to obtain the purchase price of more than \$11,000.00 from appellant, as the principal. Irrespective of whether appellees claim, and disingenuous as it is, that appellant was unknown to them as the purchaser, the law, above

stated, unquestionably supports this cause of action in appellant's favor.

In further support of the above principle of law, we quote from *Usher vs Daniels*, 73 N.H. 206:

"The doctrine that an undisclosed principal may sue in his own name upon a written as well as an oral contract made by an agent in his own name, and that parol evidence is admissible to prove the plaintiff's interest, is well established . . ."

And we find in 130 A.L.R. at page 669:

"However, the mere fact that the third party contracted with the agent upon the *supposition* that the latter was dealing for himself, *or made calculations based on that supposition, will not defeat recovery by the principal*. And even the fact that the third party was misled by the pretense of the agent that he was dealing for himself *is not usually regarded as material or prejudicial; . . .*"

In the light of the above well established principles of law, the trial court erred in its findings of fact and conclusions of law holding that appellant's claim was against its agent Meyer and not properly against appellees as vendors.

**THE DOORS WERE SOLD BY DESCRIPTION AND
THE FAILURE TO SHIP DOORS SPECIFICALLY
DESCRIBED IS A BREACH OF AN EXPRESS
WARRANTY.**

ARGUMENT

Appellees cannot dispute the premise that appellant ordered doors specifically described as F-82. This description of a two panel door is particularly recognized in the millwork trade. (R-25-26)

“DEFINITION OF EXPRESS WARRANTY. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon . . .”

Section 71-112 Oregon Compiled Laws Annotated

An examination of *Exh. 3* (R-52) makes it unsailable that the buyer was ordering doors of a certain quality and of a definite description. No one disputes that doors described as F-82 was the only order placed with appellees, and they do not deny that the shipment did contain that quality or grade. Appellees in fact, acknowledge in writing that the doors shipped to appellant amounted to a fraud, (*Exh. 5*, R-216) and, to use their own expression, was a “load of junk . . .”

There is no dispute that the description, F-82, is similar to a particular brand of merchandise, and, should it be asserted, that no express warranty was given, yet the law is, that the sale of an article described as of *particular brand* implies a contract that shall be of the quality which that brand implies. See

Springfield Shingle Co. vs Edgecome Mill Co. 52 Wash. 620. In that case an action for damages was filed upon the sale and delivery of certain shingles, known to the trade as "Star A Star". The shingles delivered were not of that grade, but were of an inferior grade, and not worth the price paid. The evidence found by the court indicated that "Star A Star" was a brand of shingles of superior quality, generally manufactured in the state and that it was a custom established among shingle manufacturers to have such shingles conform to certain specifications, and that when shingles were stamped and packed as "Star A Star" such label indicated that the shingles came up to and fully met the specifications required. In affirming a judgment for damages and citing numerous authorities the court concluded:

"... We therefore approach the determination of the legal question involved herein with the finding *that the shingles were sold and purchased as "Star A Star" shingles* . . . It would not require a very vivid imagination, under these circumstances, to hold that they were sold as "Star A Star" . . . The action is not brought upon any theory that the shingles were not good, sound, merchantable shingles, or that the timber in them was dead, rotten, or of any other unsound quality; *but the theory of the case is that the sale of an article as being of a particular description does imply a contract that the article sold is of that description*, a doctrine that is supported by abundant authority . . . and if this condition be not performed, the vendee is entitled to reject the article, or, if

has paid for it, to recover back his money.”
(Emphasis added)

Another authority in point is *Baker vs J. C. Watson Co.* 134 Pac. (2) 613, (Ida.) where it was held that if the contract for sale of peaches was for U.S. No. 1's, the buyer was required to accept only peaches of such grade.

We also find the following in 46 *Am. Jur. Sec.* 328 at pages 509-510;

“ . . . It seems to be generally held that where an article is sold by a descriptive name or by description, this is, if justifiably relied on by the buyer, a warranty that the article corresponds with the descriptive name or description. This is held true, especially in the more modern cases, where the sale is of goods *by a particular description as to quality or condition*. A sale of goods by a particular description of quality imports a warranty that the goods are or shall be of that description, which becomes a part of the contract if relied upon at the time by the purchaser. *This rule applies to a sale under a trade term which by use has become generic*. Each different quality of goods may be regarded as a different kind of goods . . . ”

Where specified goods are sold in compliance with an order describing the goods and the seller furnishes them, he is held to warrant that the goods are of the kind asked for. It is a substantive part of the contract that the goods shall be of the kind ordered. That is one of the terms of the contract without the fulfillment of which the contract cannot be performed.

Parrish vs. Kotthoff, 128 Ore. 529; 274 Pac. 1108

Kitterman vs. Eagle Pine Co., 122 Ore. 137; 257 Pac. 815

**APPELLANT PROMPTLY NOTIFIED APPELLEES
THAT IT REFUSED TO ACCEPT THE SHIPMENT
WHICH WAS IN VIOLATION OF THE EXPRESS
WARRANTY**

ARGUMENT

The acts that constitute an acceptance of goods by the buyer are defined in *Section 71-148 Oregon Compiled Laws Annotated*:

“The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent to the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.”

When the carload of doors reached North Carolina, and prior to its inspection, appellant was informed by its customers to whom it had sold the doors, that they were not of the grade F-82, as warranted (R-58-59). Inspection thereupon was made by appellant and the breach of warranty being obvious notice thereof was promptly transmitted to appellees through Meyer. The Court should consider *that appellant had already expended nearly \$1,000.00 in freight charges alone*. It is

not unique or unusual for any prudent business man, before incurring an additional expense of that proportion, to communicate with the seller to ascertain the disposition to be made with merchandise *palmed off* to it in violation of the agreement. Certainly, no prudent business man would incur a freight liability of an additional \$1,000.00 by returning the shipment without first notifying the seller. The law does not require the buyer to do a vain act. The remedy for breach of warranty is set forth in *Section 71-169*, Oregon Compiled Laws Annotated:

“(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.”

Appellant had already paid in advance more than \$11,000.00 when it found itself burdened with 1500 doors delivered to it in violation of an express warranty. What did it do that was inconsistent with the rights of appellees? Appellant asked them for instructions, and it was suggested it be patient, and that an investigation would be made and something done. What under the circumstances, was the buyer to do in the mean time, with more than \$14,000.00 including freight and handling costs, invested in merchandise it could not sell, in merchandise it did not order?

"In the absence of any provision in the contract of sale governing time for inspection, the buyer has a reasonable time for examination and rejection and to give notice thereof."

46 *Am. Jur. Sec.* 250, page 431

"... Acceptance of possession is also to be distinguished from acceptance of, or agreement to accept, title of specific goods, so if the buyer expressly refuses to accept the title of the goods tendered, his permitting the goods to be placed on his premises for the mutual convenience of the parties cannot be considered an acceptance of title..."

46 *Am. Jur. Sec.* 251 page 433

We contend that appellant did not accept the shipment, on which it had already paid the full purchase price.

The conduct of the parties must be considered in the light of reasonable and prudent business men. This is not a case where the seller is awaiting his money for merchandise sold in breach of warranty. This is a case where a buyer, *paid in advance, for specified goods*, and was fraudulently sold and delivered something not ordered nor wanted.

In *Sig C. Mayer & Co. vs Smith*, 112 *Ore.* 559, 230 *Pac.* 355, in passing on a somewhat similar problem, we find the following:

"It would be manifestly unjust for a seller, after supplying a part of the goods to be delivered in installments as ordered, to change the articles agreed to be sold, *or to depart from the order and deliver goods not answering the description in the original contract, and compel the defendant to ac-*

cept goods not ordered by him, because the buyer had sold part of the goods without knowing of the change. This would open wide the door to fraud." (Emphasis added)

And also review, *Eaton vs. Blackburn*, 52 Ore. 300, 96 Pac. 870; 97 Pac. 539, 20 L.R.A. (NS) 53.

Conduct which was held not to be an acceptance, in view of the circumstances, was passed upon in *Continental Lumber Co. vs. Miller* (Tex. Civ. App.) 161 S.W. 927. That was an action for the price of lumber tendered to the purchaser and rejected by him. Following the rejection, the parties negotiated for a settlement. During the course of the negotiations, and under the mistaken impression, that the matter had been settled, the purchaser used a small quantity of the lumber. The Court held, that this was not necessarily an acceptance.

Another pertinent authority, and on fours with the case at bar, is *James H. Smith Co. vs. Screw Mach. Prod. Co.* (R.I.) 133 Atl. 440. That was an action by the seller for the price of certain spindle heads to have been manufactured by the seller pursuant to a sample furnished by the purchaser. When the spindles arrived, the purchaser notified the seller that they were not in accordance with the sample, and rejected them. However, pending negotiations between the seller and the purchaser, the purchaser sent some of the spindle heads to his customer in an effort to determine

whether they were usable although not in conformity with the sample. The Court held, that this was not such an act of dominion over the merchandise as to be inconsistent with the ownership of the seller, and therefore, was not an acceptance.

Now in the case at bar, the doors did not in any manner conform to the description F-82. This is the description of a standard door readily salable in any market. The doors shipped to it were substandard and no user of these doors could be found in North Carolina.

The authorities are legion which hold, that where the purchaser retains or exercises dominion over the merchandise *while giving the seller an opportunity to make the goods conform to the order or contract, will not be held thereby to have accepted the goods.* Some of these authorities are collected in 55 C. J. Section 493, page 501, and read:

"But the circumstances surrounding the buyer's subsequent use of or other acts in relation to the goods may be such as to prevent the same from constituting an acceptance."

To the same effect is *Williston on Sales*, Revised Ed. Vol. 3, page 11, Section 474 and also page 35:

"Retention which might otherwise indicate an acceptance may be explained not only as stated above, but by proof that the seller had requested the retention with promises of correction of defects or similar assurances."

Of course, in the case at bar, appellees indicated by their conduct they did not want the "lemons" back on their hands! Whatever appellant may have done when it found itself with 1500 unsalable doors, *for which it already paid*, was done with appellees acquiescence, and not inconsistent with the sale.

Baker vs J. C. Watson Co, supra, while involving perishable products, is apposite to the case at bar. In that case the evidence disclosed that the buyer purchased U.S. No. 1 peaches; that the peaches shipped to it did not have that quality. The contract of purchase required the five carloads of peaches to be delivered to the buyer at Laramie, Wyoming. In transit the cars were diverted by the purchaser from Laramie to Chicago. Upon arrival there, the purchaser found that the shipment did not conform to the grade of peaches purchased by it, and rescinded the contract, notified the seller thereof, and asked for instruction as to the disposition of the peaches. The seller refused to accept rescission and disclaimed further responsibility. Whereupon the buyer sold the peaches to the account of the seller, and, after deducting expenses and freight sent the proceeds to the seller who refused acceptance. The seller recovered the full purchase price. In reversing the case and passing on the various questions raised, including whether there had been an acceptance by the buyer, or acts inconsistent with a rescision, the court stated:

“It is urged appellant is liable for the full purchase price on the ground that there had been such acceptance under section 62-308 I.C.A., as to prevent its being entitled to the defense of breach of warranty and rescission therefor, because the peaches were sold by appellants through LaMantia Brothers, and that such resale was conduct inconsistent with rescission. Such contention overlooks section 62-507 I.C.A. Appellant having made its election of remedies under 62-507, (1) (d) (2) I.C.A. subdivision 5 of that section defines its rights and liabilities as the buyer thus:

62-507. Remedies for breach of warranty—
1. Where there is a breach of warranty by the seller, the buyer may, at his election: * * *

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received return them or offer to return them to the seller and recover the price of any part thereof which has been paid.

(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted. * * *

(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept the offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 62-402.”

NOTE—In Oregon similar provisions of the Uniform Sales Act are in effect. Section 71-169 O. C. L. A. (d) (2) (5). Also Section 71-170 O. C. L. A.

We particularly call to the court's attention the special concurring opinion of Justice Ailshie, wherein he remarked:

"There are two kinds of acceptance,—” said Justice Lamar, in *Delaware, L. & W. R. Co. v. United States*, 231 U.S. 363, 34 S. Ct. 65, 67, 58 L. Ed. 269, 273—"one of quality and the other of title. They are not necessarily contemporaneous. There may be an acceptance of quality before delivery, as where goods are selected by the purchaser, delivery and transfer of title being postponed until a later time. Or, there may be an acceptance of title without an acceptance of quality; so that in many cases, after the title has passed, the purchaser may recover damages if the goods, upon inspection, prove to be of a quality inferior to that ordered."

"Where an article is purchased and, after its receipt, is found defective by the vendee or not of the standard, grade, quality or kind ordered, it is sometimes easy and convenient to return it without loss or depreciation and at slight cost of redelivery; *but in many cases of long distance, shipment is too expensive to return the property to the vendor at the place from which shipped, and, due to lack of agent or acquaintance at place to which the consignment has been shipped, it is wholly impracticable for the vendor to take possession and dispose of the property at the distant point to which it has been diverted. The law therefore requires the purchaser to take charge of the property and dispose of it as the vendor's agent, to the best practical advantage, in case the vendor refuses to accept the return of goods.*"

(Emphasis added)

Appellant gave immediate notice that the shipment failed to conform to the order. Appellees do not claim that it does conform. Therefore, the shipment being

in violation of the terms of the contract, no sale actually was consummated and appellant is entitled to the return of its money. This rule of law is found in 46 *Am. Jur. Sec.* 254, at page 437:

“ . . . If the buyer promptly notifies the seller that the goods do not conform to the requirements of the contract, his failure to make a manual return does not necessarily constitute an acceptance; in such a case, the general rule that to rescind a sale for fraud, defect in quality, or the like there must be an actual return or tender does not apply, *since the exercise of the right to reject is not the rescission of the sale, but prevents the consummation of a sale in the first instance . . .* ”

Another authority apposite to the case at bar is *Kitterman vs Eagle Pine Co.* 122 Ore. 137, 257 Pac. 815. This was an action to recover the balance due on the purchase price of 20 carloads of lumber sold to defendant. In defense thereto the answer alleged breach of warranty as to quality. Plaintiffs were the manufacturers and agreed with defendant a wholesaler to deliver f.o.b. Grants Pass, Oregon to sell and deliver “bright lumber” only. Plaintiffs shipped dry pine lumber. The principle question before the court related to acceptance. Justice Belt, in reviewing many of the problems presented in the case, said:

“The lumber mentioned in the contract of sale was specifically described and the minimum prices therein quoted were on “bright lumber only”. It is clear that a warranty existed that the lumber shipped would comply with the description and

specifications of the contract of sale, and was of a merchantable quality . . .

“The right of inspection is to enable the buyer to ascertain whether the goods delivered conform to the contract of sale. *Where and when this right is to be exercised depends on the nature of the contract, the character of the goods, the manner in which they are shipped, and any other fact or circumstances tending to show what was within the contemplation of the parties, as expressed in their contract, or by their conduct in reference thereto. The law applicable to such right is in keeping with reason and common sense. . . .* It is the purpose of the law to give the buyer a reasonable opportunity to examine the goods delivered before there is a completed sale. . . .

“It is true that the title to the lumber passed to the defendant when it was delivered at Grants Pass, but it was a conditional title, subject to be defeated by failure of the seller to deliver the kind and quality of lumber agreed to be sold. . . .

“That warranty of the quality of goods survives the acceptance of the goods by the purchaser. . . .”

(Emphasis added)

In the case at bar, appellant had no inspection prior to shipment. It diverted and sold the doors before their arrival and it was not until its customers complained that it learned of the breach of warranty. The fact that a claim to the railroad was made for damages for 29 doors is not significant to support appellees contention that that amounted to an acceptance. The testimony is the following: (R-64-65).

A. Oh, yes, they were sold while the car was en route. All of these had been. And the remain-

der, twenty-nine I think, were damaged on arrival of the car which were, of course, left with the railroad. They were left with railroad for subsequent handling.

* * *

Q. In whose behalf did you file the claim against the railroad company?

A. We assumed we were filing it in behalf of the shipper of the doors, *since the doors, not being what we had ordered, were not our doors.* We did it purely to protect his interest on the shipment. It was the only thing that could be done with them . . . ”

**THE TENDER BY APPELLEES OF A CHECK IN
THE AMOUNT OF \$615.00 IS NOT AN ACCORD
AND SATISFACTION**

ARGUMENT

Appellees, subsequent to being notified by appellant that the shipment violated the terms of the agreement and was not merchantable, commenced a course of conduct directed toward the manufacturer for a settlement. The evidence indicates that the manufacturer was in straightened circumstances. (R-212) Notwithstanding, appellees represented to appellant that they had obtained \$315.00, from their seller and offered to add to that sum their alleged commission of \$300.00, and mailed to appellant a check for \$615.00. *The truth of the matter is, that appellees realized more than a \$1,000.00 profit on the transaction.* (R-182). Appellant returned the check of \$615.00, (R-221) and

informed appellees that a visit would be made to the West Coast in an effort to settle the claim.

“An accord and satisfaction is *the result of an agreement between the parties*. This agreement must have all the essentials of a valid contract,—that is, must be made between competent parties *and upon a sufficient consideration . . .* Unless *this agreement exists* between the parties, *there is no accord and satisfaction . . .*”

1 Am. Jur. Sec. 19, page 221

There is not one word of testimony or evidence that appellant *agreed* to accept \$615.00 in settlement of an approximated \$14,000.00 valid and just obligation. *Here is a plain case of fraud, admitted by appellees!* (R-216) It shocks our sense of conscience to believe for one moment that it can justly be concluded that the *unilateral action* of appellees in sending their check for \$615.00 amounted to a *mutual* agreement of accord and satisfaction! The check was not accepted nor cashed. It was returned to appellees.

The law is well established that the *mere receipt by a creditor of a check is not an acceptance where prompt notice is given* and the check is not cashed.

... “However, the mere receipt and retention by a creditor of a check for part of his claim is not an acceptance of a condition that the check was to be in full satisfaction, where the creditor gave prompt notice of his refusal to accept the condition and did not cash the check *or make any affirmative use of it . . .*”

1 Am. Jur. Sec. 29, page 230

It should be borne in mind, that appellees claim, that it was part of the alleged agreement of accord and satisfaction, that Meyer was to mail her check for \$300.00. (R-106-R-212) Exh. 4. *There is no evidence that such a check was ever mailed.* On that point alone, *the alleged agreement of accord and satisfaction fails of proof.* For example, if a debtor claims as an accord and satisfaction, that he would pay a certain sum and also give another consideration, the failure to fulfill such an agreement prevents a satisfaction of the accord.

“The rule is universally recognized that except where the new agreement is itself accepted as a satisfaction, the failure to make a payment or otherwise perform an act required by a new agreement entered into in satisfaction of a debt or claim leaves such an agreement a mere executory accord, without satisfaction, and as such, it constitutes no bar to the enforcement of the original claim or debt. In other words, in order that a demand or cause of action may be barred by an accord, the general rule is that the accord must be executed. Why the payment is not actually made or the accord execute is apparently immaterial. The promise is to satisfy, and until the promise is fulfilled, the agreement is not binding, and since it is not a bar to an action on the original debt, it follows that is of no consequence as a bar to the original claim. . . .”

1 Am. Jur. Sec. 65, pages 251-252

We, therefore, respectfully submit, that appellees have wholly failed to establish an accord and satisfaction.

CONCLUSION

A careful review of the evidence conclusively establishes that appellees, as vendors, sold to appellant, as vendee and the principal, a carload of doors warranted to be of a specific grade and quality known as F-82. Appellees admit that appellant was defrauded in relation to the warranty. The violation by appellees of the provisions of the Uniform Sales Act being overwhelming, the judgment of the lower court should be reversed and a judgment rendered in favor of appellant for its damages.

Respectfully submitted,

LEO LEVENSON

W. J. PRENDERGAST JR.,

Attorneys for Appellant.

**In the United States
Circuit Court of Appeals
For the Ninth Circuit Court**

P. M. BARGER LUMBER CO., a corporation doing
business under the name and style of Barger Mill-
work Company,

Appellant

vs.

J. L. WHITEHOUSE and INTERSTATE LUMBER
SALES, INC.,

Appellees

Appellees' Brief

Upon appeal from the District Court of the United
States for the District of Oregon

LEO LEVENSON
W. J. PRENDERGAST, Jr.,
Portland, Oregon
Attorneys for Appellant

OTTO F. VONDERHEIT,
STANLEY R. DARLING,
Eugene, Oregon,
Attorneys for Appellees

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**In the United States
Circuit Court of Appeals
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P. M. BARGER LUMBER CO., a corporation doing
business under the name and style of Barger Mill-
work Company,

Appellant

vs.

J. L. WHITEHOUSE and INTERSTATE LUMBER
SALES, INC.,

Appellees

Upon appeal from the District Court of the United
States for the District of Oregon

APPELLEES' STATEMENT OF THE CASE

At the time of the transaction in controversy the appellee Whitehouse was the successor in interest to Austin Dodds Lumber Co., and was engaged in the business of buying and selling lumber and lumber products as a wholesaler or wholesale lumber dealer. The Appellee had his principal place of business in Eugene, Oregon. F. M. Lytle was employed by the Appellee as a lumber finder. F. M. Lytle's office was in Portland,

Oregon. (R-133, 134, 139). (These facts are admitted).

At the same time Ruth Meyer, not a party to this proceeding, also was engaged in the business of buying and selling lumber and lumber products as a wholesaler or wholesale lumber dealer. Her office was in Portland, Oregon. (The Appellant denies that Ruth Meyer was a wholesale lumber dealer.)

The carload of doors involved in the controversy was ordered and obtained in the following manner: On January 10, 1948, F. M. Lytle received a telephone call from Ruth Meyer asking for doors (R-136). Mr. Lytle indicated he had or could obtain a carload of doors. On the same day Ruth Meyer called back and ordered the doors (R-137, 144); Ruth Meyer confirmed her order by a letter received by Mr. Lytle on January 11, 1948 (R-137). The telephone order was relayed by phone to the Eugene office of the appellee Whitehouse who, in turn, sent an order, by wire, to Grant Manufacturing Co., Del Paso Heights, California (R-164). On January 12, 1948, the carload of doors was enroute to the destination in North Carolina requested by Ruth Meyer as evidenced by the Grant Manufacturing Co. invoice to Austin Dodds (Exhibit Q, R-165, 46). (None of these facts appear to be disputed).

Payment for the doors was made as follows: The California manufacturer drew a sight draft on Austin

Dodds Lumber Co., with invoice and order bill of lading attached, and sent it to The First National Bank of Eugene, Oregon (Exhibit R, R-165, 175, 176, 179). The draft was paid by appellee Whitehouse on January 15, 1948 (R-179). The Appellee then drew a draft on Ruth Meyer, Bank of California, Portland, Oregon, and attached to it a bill of lading from the Appellee and the endorsed order bill of lading from the California manufacturer. The draft with the attached bills of lading was then deposited in The First National Bank of Eugene, Oregon, for collection. (R-174, 175) The Eugene bank gave credit to the Appellee for this draft on January 19, 1948 (R-181). Ruth Meyer then attached the order bill of lading to her own invoice to the Appellant (R-54). Ruth Meyer was paid by the Appellant. (None of these facts appear to be disputed).

One of the questions presented to the trial court by the pre-trial order and the evidence was whether any contractual relationship ever existed between the Appellant and the Appellees which would give the Appellant a cause of action against, or a right to sue, the Appellees.

The trial court found that Ruth Meyer was a wholesale lumber dealer and that Ruth Meyer purchased the doors in controversy in her capacity as an independent wholesale lumber dealer, and not as an agent for the

Appellant (Finding of Fact No. VII. R-14). From these findings the trial court concluded that the transaction between appellee Whitehouse and Ruth Meyer was a separate independent transaction complete in itself, and that no contractual relationship of seller and buyer, or other contractual relationship, existed at any time between the Appellant and either of the Appellees with reference to the doors in controversy (R-15).

QUESTION INVOLVED ON APPEAL

Is there any substantial evidence to support the Findings of Fact made by the trial court, particularly Finding of Fact No. VII (R-14) ?

ARGUMENT

I

FINDINGS OF FACT BY A TRIAL COURT IN AN ACTION WHICH WOULD BE CONSIDERED AN ACTION AT LAW UNDER THE COMMON LAW WILL NOT BE SET ASIDE BY AN APPELLATE COURT IF THERE IS ANY SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDINGS.

This controversy was an action tried upon the facts by the court without a jury. *Rule 52 (a) of the Federal Rules of Civil Procedure*, 28 U.S.C.A., following Sec-

tion 723c applies. This rule states, in part, "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

The Appellant's brief appears to be based upon the assumption that the Appellate Court under Rule 52(a) will view this appeal, in an action for damages, in the same manner that it views cases in equity and in admiralty. A similar contention was rejected in *Western Union Telegraph Co. v. Bromberg* (C.C.A. 9th, 1944) 143 F. (2d) 288, 290 by the following language:

"The main contention made by appellant is that Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, requires this court to view this appeal in the same manner that it views cases in equity and in admiralty. . . .
". . . . The rule does not disturb the long followed principle that the judge or jury which has seen and heard the witnesses is better qualified to weigh their testimony than is a reviewing tribunal and that findings of fact of the trial body will not be set aside unless clearly erroneous. Appellate Courts are, however, free to draw inferences and conclusions from findings of fact. See *Kuhn v. Princess Lida of Thurn & Taxis* 3 Cir. 1941, 119 F (2d) 704, 705, 706."

In *Kuhn v. Princess Lida of Thurn & Taxis* (C.C.A. 3rd, 1941) 119 F. (2d) 704, 705, cited in the above decision by the Ninth Circuit, the Court stated, on page 705:

" The reason for the rule rests in a large part upon the fact that the trial judge who hears

the witnesses testify and observes their demeanor upon the stand is better qualified to appraise the credibility of their testimony and to resolve the conflicts therein. So long, therefore, as a finding of fact is supported by evidence and is not clearly erroneous, it is to be accepted on appeal as verity."

Under Rule 52(a) the Appellate Court does not attempt to pass upon the evidence de novo, to weigh the evidence, or to settle conflicts therein, or to consider the credibility of witnesses:

"We do not understand that the foregoing rule has enlarged the discretion of this Court in passing upon the probative force of evidence. Our function is to review the finding of the lower court and not to pass upon the evidence de novo. We cannot say that a finding of the fact of prior use is "clearly erroneous" merely because we might have entertained some doubt about the quantum of evidence. We must attach to the testimony of the witnesses the full weight and quality of credibility which the trial court gave it."

Webb v. Frisch (C.C.A. 7th, 1940)
111 F. (2d) 887

"In the application of Federal Rule 52 it is the following principle that guides this Court: the reviewing court does not review the evidence as an original fact finding tribunal; it does not attempt to settle conflicts in evidence or to determine questions of credibility. Whether special findings are supported by the evidence or whether they give the requisite support to conclusions rendered thereon, are questions open to consideration here."

Campana Corporation v. Harrison
(C.C.A. 7th, 1940) 114 F. (2d) 400, 405)

“The question for decision in this case is whether there is sufficient basis in the evidence for the court’s findings of fact. In deciding that question we are required to take that view of the evidence which is most favorable to the appellees.”

“. The findings of fact of the trial judge are not clearly erroneous unless unsupported by substantial evidence, or clearly against the weight of the evidence, or induced by an erroneous view of the law. ‘This Court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. * * * The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly.’ *Cleo Syrup Corporation v. Coca Cola Co.*, 8 Cir., 139 F. (2d) 416, 417, and cases cited.”

Smith v. Porter (C.C.A. 8th, 1944)
143 F. (2d) 293, 294, 295

“. We have to determine only whether the finding of the trial court is clearly erroneous. The finding is not clearly erroneous if there is substantial evidence to support it. We consider only the evidence that supports the court’s finding. We do not weigh the evidence or resolve any conflicts therein, or consider here the credibility of the witnesses.”

Fox River Paper Corporation
v. United States (C.C.A. 7th, 1948)
165 F. (2d) 639, 640

The above quoted decisions were in cases which would be classed as law actions at common law. These cases and numerous others have established the rule that findings of fact made by a trial court on waiver of a jury in an action which under the common law would

be considered to be a law action will not be considered clearly erroneous if there is any substantial evidence to support the findings.

The only case which counsel for the Appellees have found involving a finding of fact by the court on the existence of an agency relationship was a case in equity entitled *Blum v. William Goldman Theatres, Inc.* (C.C.A. 3d, 1947) 164 F. (2d) 192. This was an action to compel conveyance of property and it is interesting and pertinent to the present appeal to notice the attitude of the appellate Court toward a finding of fact by the trial court in an equity case. On page 196 of the reported decision the following language appears:

“Considerable attention was devoted at the trial to the question whether Friedmann was Blum’s agent. After careful consideration, the trial court found as a fact that Friedmann was not. It is not for us to decide whether we would reach the same conclusion had we been the original triers of fact. . . . There being sufficient evidence to support that finding of fact, we are not disposed to weigh the testimony anew.”

II

THE FINDINGS OF FACT MADE BY THE TRIAL COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The record discloses the existence of substantial evidence to support the findings of the trial court that the doors in controversy were purchased from the ap-

pellee Whitehouse by Ruth Meyer in her capacity as an independent wholesale lumber dealer, and not as an agent for the Appellant, and that no contractual relationship existed at any time between the Appellant and either of the Appellees.

By the customs and usages of the lumber business in the Northwest trade area a wholesaler is not an agent, but he is one who buys and sells and invoices for himself, for his own account (R-116, 117, 152, 154). Under the same customs and usages a commission man is one who acts as an agent for the producer or the customer (R-152); a commission man or agent does not invoice, and when a sale is made through a commission man or agent the customer is invoiced directly by the seller (R-152, 118); ordinarily, when dealing with a commission man, the customer pays the shipper directly (R-153); and the commission man receives his commission from the person for whom he acts as agent (R-118, 152, 153).

Ruth Meyer was described as a wholesale lumber dealer on her stationery and purchase orders (R-137). She was listed as a wholesaler in the Lumberman's Red Book, a credit service publication for the lumber industry (R-191). Ruth Meyer was known to the appellee Whitehouse to be a wholesaler or wholesale lumber dealer and he dealt with her as a wholesaler (R-168,

181, 191). Other persons in the lumber business dealt with and sold to Ruth Meyer on an independent completed transaction basis (R-123). The doors in controversy were sold to Ruth Meyer (R-180, 209); Ruth Meyer was invoiced directly (R-54, 209); Ruth Meyer paid for the doors and received title to the doors (R-181); and Ruth Meyer invoiced the Appellant (R-54).

A copy of the written purchase order, dated January 12, 1948, from Ruth Meyer to appellee Whitehouse (Exhibit 3, R-52, 48, 145) has the word "Agent" typewritten upon it (R-50). Before this order could have been received by appellee Whitehouse the carload of doors had been purchased under an agreement that they were sold to Ruth Meyer and they were on their way to their destination (R-46, 49, Exhibit 6, R-165). In prior purchase orders sent to appellee Whitehouse Ruth Meyer had never used the word "Agent" (R-123) and it was not used in subsequent orders (R-138). Mr. Brackensick testified that he had never seen the word "Agent" on any purchase orders from Ruth Meyer (R-123).

The Appellant's own testimony is inconsistent with its contention that Ruth Meyer was acting as an agent and not as an independent wholesale lumber dealer. Cecil Barger, the manager of Barger Millwork Company and an officer of the appellant corporation was

the only witness for the Appellant. Mr. Barger indicated that he considered persons in Ruth Meyer's situation to be middlemen, making a profit through an intermediate markup (R-80, 82). A middleman with a markup profit is inconsistent with and not found within a principal and agent relationship. Through Mr. Barger's testimony it was revealed that the Appellant had no knowledge of the price Ruth Meyer was paying for the doors, it was interested only in the price at which she would sell (R-83); the amount of Ruth Meyer's commission or profit was not considered to have any direct effect on the appellant (R-84); it would have made no difference to the Appellant if Ruth Meyer sold the particular carload of doors she was talking about to someone else so long as the Appellant received a similar car (R-84, 85), and where Ruth Meyer got the doors was of no particular interest to the Appellant (R-94). These statements are contrary to the concept of agency and indicate that the Appellant was making a purchase from Ruth Meyer and not from someone else through Ruth Meyer.

CONCLUSION

This case on appeal is definitely within Rule 52 (a) of the Federal Rules of Civil Procedure and the interpretations thereof cited and quoted in this brief. The trial judge saw and heard the witnesses testify; he ob-

served their demeanor and he was in a position to appraise the credibility of their testimony and to resolve any conflicts in the testimony submitted. In addition to these unrecorded factors the record before this Court clearly shows the existence of substantial evidence to support the findings of fact made by the trial court. We submit that the findings of fact should not be disturbed, and that the judgment of the trial court should be affirmed.

Respectfully submitted
OTTO F. VONDERHEIT
STANLEY R. DARLING
Attorneys for Appellees

No. 12316

**In the United States Court of Appeals
for the Ninth Circuit**

LELA WILCOX, APPELLANT

v.

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLEE**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION**

BRIEF FOR APPELLEE

ED DUPREE,

General Counsel.

LEON J. LIBEU,

Assistant General Counsel.

FRANCIS X. RILEY,

Special Litigation Attorney,

Office of the Housing Expediter,

Washington 25, D. C.

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12316

LELA WILCOX, APPELLANT

v.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION*

BRIEF FOR APPELLEE

JURISDICTION

This is an appeal from a judgment of restitution for rent overcharges and an injunction restraining violations of the Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1881, et seq.), entered by the Court below on April 8, 1949 (R. 46). The judgment of restitution was based upon Section 205 (a) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 901, et seq.), and Section 206 (b) of the Housing and Rent Act of 1947 and the injunction was granted pursuant to Section 206 (b) of the Housing and Rent Act of 1947. Jurisdiction of this Court is invoked pursuant to Section 1291 of the Judiciary and Judicial Code (28 U. S. C. A. 1291).

FACTS

The principal question presented in this appeal is whether the Court below erred in finding as a fact that the premises of which appellant was the landlord was rented on a daily basis or on a weekly basis (Tr. 3-4). The tenants testified that they rented the premises on a weekly basis (Tr. 8, 18, 24, 31, 34). The defendant relied upon written receipts showing that the premises were rented on a daily basis, and denied renting on a weekly basis. On the stand defendant was unable to state whether, in renting the premises to the tenant Page, she quoted a daily rate or a weekly rate (Tr. 39-40). At the conclusion of the hearing the Court made findings of fact and conclusions of law in which, among other findings, he stated that the defendant collected amounts, in excess of the legal maximum weekly rent (Findings 8, 9, 11, 12, 13, 14, 15, R. 39-41). The Court thereupon concluded that restitution should be made in the amount of the overcharges so found and an injunction should issue (Conclusions 2, 3, 5a-d, R. 42-44). From that judgment the landlord appeals (R. 59).

ARGUMENT

I

The District Court's finding that the premises herein were rented on a weekly basis is supported by substantial evidence. In any event the finding is not so clearly erroneous that it should be set aside

As stated above, the principal question before the Court was whether the premises herein were rented on a weekly or a daily basis (Tr. 3-4). The tenant Page

testified unequivocally that she rented the premises on a weekly basis. In this connection she testified:

The WITNESS. We asked to see the room; we saw the room we said, "What is the rental?"

The COURT. Who is "we"?

The WITNESS. My husband and myself.

The COURT. Which one of you talked to her?

The WITNESS. We both did. We said, "What is the rental?" and she said "\$10.50 a week." We came to the house through a real estate agent, and he charged —

The COURT. Never mind about what he charged.

The WITNESS. There was no mention of a daily rate.

The COURT. Mrs. Wilcox said ten dollars and a half a week?

The WITNESS. Yes. There was never any mention to me of a daily rate, never.

The COURT. Nothing was said about it?

The WITNESS. Nothing whatsoever (Tr. 7-8).

The tenant Hall testified as follows:

Q. Was anything at all said about the daily rate at the time that you rented this room for Miss Lensky?

A. I can't recall any daily rate, because we paid always by the week.

The COURT. No. Was anything said about it?

The WITNESS. No, sir.

The COURT. Nothing was said about so much a day?

The WITNESS. No, nothing at all. I paid weekly for both my daughters and myself (Tr. 18-19).

The tenant Lensky testified in a similar vein:

A. Yes, Mrs. Wilcox wanted to know whether I was going to stay or going to move, and I told her I would like to stay. Mrs. Wilcox informed me that the rent would be \$10 a week, the same as it was before.

Q. At that time did you have anyone with you after Mrs. Hall left?

A. No; I didn't for a period of months.

Q. But nevertheless you paid how much?

A. \$10 a week.

Q. Was there anything said to you by Mrs. Wilcox with reference to a daily rate at that time?

A. No (Tr. 24).

The defendant Shore, an agent of defendant Wilcox, was called as a witness under Rule 43 (b) of the Federal Rules of Civil Procedure and testified that the premises in the rear were rented on a weekly basis to the tenant Pytlik.¹ The testimony in that connection was to the same effect as the foregoing:

A. I was not, but the young lady called Ruth Actor said he made arrangements, he offered \$10 a week himself, personally.

Q. Were you there when he made that offer?

A. No; I was not. But this young lady called Ruth Actor, she moved the last year, she told me that, and Miss Wilcox told me the same thing, I was there two hours afterwards, she told me Miss Wilcox had rented that room for \$10, that it was his own price.

The COURT. \$10 a week?

¹ The judgment in favor of the tenant Pytlik was against the defendant Otto Smith (R. 47). Since no appeal has been taken from that judgment, it is not in issue before this Court.

The WITNESS. Yes.

The COURT. What did Mrs. Wilcox say?

The WITNESS. Mrs. Wilcox, she made the deal.

The COURT. Did you talk with Mrs. Wilcox and ask her if that was true?

The WITNESS. Yes, later.

The COURT. What did she say?

The WITNESS. Yes, she said he offered \$10.

The COURT. And she accepted it?

The WITNESS. Yes.

The COURT. \$10 a week (Tr. 34).

The defendant took the stand on direct examination and was interrogated by the Court at the outset. With regard to the foregoing testimony of Mrs. Page the defendant was unable to testify that she had ever mentioned to the Pages that the premises were to be rented at a daily rate (Tr. 38). Under direct examination by the Court, she continued to evade answering directly that she said that the premises were for rent on a daily basis:

The COURT. She doesn't recall whether she said anything to them about the dollar and a half a day, because she thought that had been told by the agent who sent them. That is your testimony?

The WITNESS. I could have done it, but I imagine I did think—because I quoted the rate to the agents.

The COURT. Then you don't recall that you told them a dollar and a half a day?

The WITNESS. But they signed this receipt I gave them, and I think that should be sufficient, they should see that.

The COURT. Do you want to offer that in evidence?

Mr. ZIMMERMAN. Yes, if she finds it, if the court please.

The WITNESS. It is here.

Mr. ZIMMERMAN. She showed it to me awhile ago.

The WITNESS. May I look for this later?

The COURT. Yes. Just go ahead. She can look it up later (Tr. 39-40).

In view of the above excerpts on the trial of this issue, it cannot be said that the judgment rendered by the Court below was not based upon substantial evidence. The judgment therefore should be affirmed (Rule 52 (a) of the Federal Rules of Civil Procedure (28 U. S. C. A., foll. 723 (c); *Roos v. Woods*, No. 11938, decided December 8, 1948 (C. A. 9)).

Rule 52 (a) of the Federal Rules of Civil Procedure provides in part:

* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *

In applying the above rule this Court has repeatedly held that where a finding is not clearly erroneous it is "obliged to accept it." *Coffin-Redington Co. v. Porter*, 156 F. 2d 113 (C. A. 9); *Columbian National Life Insurance Co. v. A. Quandt & Sons*, 154 F. 2d 1006 (C. A. 9th); *Wingate v. Bercut*, 146 F. 2d 725 (C. A. 9th); *Goldstein v. Polakof*, 135 F. 2d 45 (C. A. 9th); *Cherry-Burrell Co. v. Thatcher*, 107 F. 2d 65 (C. A.

9th); *Lumberman's Mutual Casualty Co. v. McIver*, 110 F. 2d 323 (C. A. 9th).

In the *Coffin Redington* case, *supra*, this Court after viewing the entire Record sustained the finding of the trial Court that the defendants violated the Emergency Price Control Act by a tie-in sale of liquors, stating at p. 114:

The trial court observed their conduct and demeanor while on the stand, and was in better position than we to appraise the situation and to draw inferences. We are not able to say that the finding in question was clearly erroneous and are therefore obliged to accept it. (*Columbian National Life Ins. Co. v. A. Quandt & Sons*, 9 Cir., 154 F. 2d 1006.

Furthermore, the conflicting nature of the testimony has been the basis upon which courts of appeals have held such evidence is "inassailable" in the court of review. (*United States v. Aluminum Co. of America*, 148 F. 2d 416, 433 (C. A. 2d)). The Court in that case, speaking through Judge Learned Hand, stated the rule as follows:

* * * However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they "must be treated as unassailable." *Davis v. Shwartz*, 155 U. S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289; *Adamson v. Gilliland*, 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356; *Alabama Power Co. v. Ickes*, 302 U. S. 464, 477, 58 S. Ct.

300, 82 L. Ed. 374. The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part and often by no means the most important part, of the sense impression which we use to make up our minds. *Morris Plan Industrial Bank v. Henderson*, 2 Cir., 131 F. 2d 975, 977. Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed "unassailable," except in the most exceptional cases (at p. 433).

So, too, in this case where the Court below had the opportunity to observe the witnesses, and weigh each one's statements upon the basis of all factors before it, this Court should give due weight to the findings based upon those factors.

This Court stated the rule to be as follows, in *Columbian National Life Insurance Company v. A. Quandt & Sons* (154 F. 2d 1006):

Where there is a conflict in the evidence, this court must keep in mind that the trial judge who hears and sees the witnesses has a better opportunity to appraise their credibility and judge the weight to be attached to their testimony. We cannot say that the finding of the

lower court was clearly erroneous. It is the rule that the findings of the trial court are to be accepted on appeal unless clearly wrong.

The appellant in her brief relies exclusively upon the case of *United States v. United States Gypsum Co.*, 333 U. S. 364, in which the Court says, at p. 395, that "a finding is 'clearly erroneous' when although there is evidence to support it the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." The Court immediately prior to the quotation relied so heavily upon by appellant also stated that "* * * findings of the trial court when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court."

Where the testimony was so unequivocal, as it was here, where all of the plaintiff's witnesses and one of defendant's witnesses testified to a weekly rate and defendant herself was unable to testify in one instance whether she quoted a daily rate, and where the trial Court based its findings entirely upon the oral evidence before it, this Court assuredly cannot be "left with the definite and firm conviction that a mistake has been committed" (*United States v. United States Gypsum Co.*, *supra*).

Since appellant clearly recognized that she had failed to make out a case in the Court below, something more than reliance upon the dictum of the *United States Gypsum* case is necessary to overturn the findings of the Court below in the face of the substantial record in this case.

Certainly, "construing the testimony most favorably in support of this finding," as this Court is "required to do" (*Chatz v. Armour Plant Employee's Credit Union*, 154 F. 2d 236, 240 (C. A. 7th) it cannot be said that the Record in this case fails to support the finding of the Court below that the premises here were rented on a weekly basis.

II

The court below properly entered an order of restitution pursuant to Section 205 (a) of the Emergency Price Control Act of 1942 and Section 206 (b) of the Housing and Rent Act of 1947, as amended

In points 3 and 4 of her brief appellant erroneously assumes that the judgment in the Court below was issued pursuant to Section 205 (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 925 (e)). That contention, of course, is contrary to the allegations of the complaint.

The action is brought "for restitution pursuant to Section 205 (a)" of the Emergency Price Control Act of 1942 and "pursuant to Section 206" of the Housing and Rent Act of 1947 (Par. 1, of complaint). In addition, no reference whatever is made in the allegations of the complaint to a claim for statutory damages under either Section 205 (e) of the 1942 Act or under Section 205 of the 1947 Act. Moreover, the complaint prays solely for equitable relief pursuant to Section 205 (a) of the 1942 Act and Section 206 (b) of the 1947 Act. Therefore, it is unnecessary to discuss at length appellant's third and fourth grounds for error. Restitution has been held to be a proper order pur-

suant to the equitable powers of a Court when properly invoked pursuant to Section 205 (a) of the Emergency Price Control Act (*Porter v. Warner Holding Co.*, 328 U. S. 395). This Court has repeatedly followed the decision laid down in that case (*Woods v. Richman*, 174 F. 2d 614 (C. A. 9th); *Woods v. Gochnour*, 177 F. 2d 964 (C. A. 9th); *Woods v. McCord*, 175 F. 2d 919 (C. A. 9th); accord, *Ebeling v. Woods*, 175 F. 2d 242 (C. A. 8th); and *Woods v. Witzke*, 174 F. 2d 855 (C. A. 6th). The same principles have been applied to the identical language used in Section 206 (b) of the Housing and Rent Act of 1947 (see, *Gates v. Woods*, 169 F. 2d 440 (C. A. 4th); *Woods v. Wayne*, 177 F. 2d 559 (C. A. 4th); *McCoy v. Woods*, 177 F. 2d 355 (C. A. 4th); *Woods v. Bomboy*, (C. A. 3rd) No. 10,027, January 16, 1950, not yet reported; and *Smith v. Woods*, 178 F. 2d 467 (C. A. 5th).

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

ED DUPREE,

General Counsel,

LEON J. LIBEU,

Assistant General Counsel,

FRANCIS X. RILEY,

Special Litigation Attorney,

Office of the Housing Expediter,

Washington 25, D. C.

APPENDIX

Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 901, et seq.):

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1881, et seq.):

SEC. 206. (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Nos. 12317-12318-12319

United States
Court of Appeals
For the Ninth Circuit.

HUGH H. EARLE, Collector of Internal Revenue for the District of Oregon,

Appellant,

vs.

LLOYD BABLER, RICHARD BABLER, JAMES A. POLLOCK and J. H. SCHESTAK, doing business as Lloyd Babler,

Appellees.

and

HUGH H. EARLE, Collector of Internal Revenue for the District of Oregon,

Appellant,

vs.

J. N. CONLEY, M. J. CONLEY and LLOYD BABLER, doing business as Babler and Conley,

Appellees.

and

HUGH H. EARLE, Collector of Internal Revenue for the District of Oregon,

Appellant,

vs.

J. N. CONLEY, M. J. CONLEY, HARRY BABLER and LLOYD BABLER, doing business as Babler Brothers,

Appellees.

Transcript of Record

Appeals from the District Court of the United States
for the District of Oregon

FILED

OCT 28 1949

PAUL P. O'BRIEN,

Nos. 12317-12318-12319

United States
Court of Appeals
For the Ninth Circuit.

HUGH H. EARLE, Collector of Internal Revenue for the District of Oregon,

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**Appeals from the District Court of the United States
for the District of Oregon**

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No. 12317

United States
Court of Appeals
For the Ninth Circuit.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Appellant,

vs.

LLOYD BABLER, RICHARD BABLER,
JAMES A. POLLOCK and J. H. SCHES-
TAK, doing business as Lloyd Babler,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

NAMES AND ADDRESSES OF ATTORNEYS

HENRY L. HESS,

United States Attorney, and

GENE B. CONKLIN,

Assistant United States Attorney,

Room 506 United States Court House,

Portland, Oregon,

For Appellant.

THOMAS R. WINTER,

Special Assistant to Chief Counsel,

Treasury Department,

713 Smith Tower Building,

Seattle, Washington,

Also for Appellant.

CARL E. DAVIDSON and

CHARLES P. DUFFY,

1525 Yeon Building,

Portland, Oregon,

For Appellees.

In the District Court of the United States
for the District of Oregon

Civil No. 4133

LLOYD BABLER, RICHARD BABLER, JAMES
A. POLLOCK, and J. H. SCHESTAK, dba
Lloyd Babler,

Plaintiffs,

vs.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Defendant.

COMPLAINT

I.

This is an action for the recovery of taxes on amounts paid for the transportation of property, together with penalties and interest thereon, illegally assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant, purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code. Jurisdiction of this action is based on Section 24 (5) of the Judicial Code of the United States, Title 28, Section 41, Subdivision 5, United States Code.

II.

During the period from April 1, 1945, to December 31, 1945, Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, plaintiffs

herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs employed certain truck drivers to transport road materials for them and paid said truck drivers at a specified rate.

III.

The Commissioner of Internal Revenue, wrongfully asserting that said truck drivers were not the employees of the plaintiffs but that they were persons engaged in the business of transporting property for hire, assessed a tax against plaintiffs equal to 3% of the amounts so paid by plaintiffs to said truck drivers during the aforesaid period, together with penalties and interest thereon.

IV.

Plaintiffs, on or about October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on or about November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue their claim for refund of \$893.87, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

Wherefore, plaintiffs pray for judgment against defendant in the sum of \$893.87, with interest

thereon from the date of payment, and for their costs and disbursements incurred herein.

/s/ CARL E. DAVIDSON,

/s/ CHARLES P. DUFFY,

1525 Yeon Building, Portland
4, Oregon,

Attorneys for Plaintiffs.

[Endorsed]: Filed June 21, 1948.

[Title of District Court and Cause.]

ANSWER

The defendant, by his attorney, Henry L. Hess, Esquire, United States Attorney for the District of Oregon, in answer to the complaint states:

I.

The allegations contained in paragraph I of the complaint are admitted except it is denied that the taxes, together with penalties and interest thereon, were illegally assessed against and collected from the plaintiffs.

II.

The allegations contained in paragraph II of the complaint are denied except it is admitted that during the period from April 1, 1945, to December 31, 1945, Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak were engaged as partners in a general contracting business.

III.

The allegations contained in paragraph III of

the complaint are denied except it is admitted that transportation taxes, interest and penalties in the total amount of \$893.87 were assessed against plaintiffs.

IV.

The allegations contained in paragraph IV of the complaint are admitted.

Wherefore, the defendant prays that plaintiffs' complaint be dismissed with costs to be assessed against the plaintiffs.

HENRY L. HESS,

United States Attorney,

Attorney for the Defendant.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon and one of defendant's attorneys herein, hereby certify that I have made service of the foregoing Answer upon the plaintiff by depositing a duly certified copy thereof in the U. S. Post Office at Portland, Oregon, on the 18th day of August, 1948, enclosed in an envelope with postage thereon prepaid addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Building, Portland 4, Oregon, attorneys of record for plaintiff.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed Aug. 18, 1948.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause having come on regularly for a pre-trial conference before the Honorable James Alger Fee, one of the Judges of the above-entitled Court, at Portland, Oregon, on the 27th day of September, 1948, plaintiff J. H. Schestak appearing in person, and all plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon, and the following proceedings were had and done:

Admitted Facts

It appears from the pleadings and the pre-trial proceedings that the following facts are admitted and may be taken and deemed by the court on the trial of this action as established facts therein:

I.

This is an action for the recovery of taxes on amounts paid for the transportation of property, together with penalties and interest thereon, assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant, purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States,

II.

During the period from April 1, 1945, to December 31, 1945, Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, plaintiffs herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs entered into several contracts whereby they undertook certain road construction or resurfacing work, and in order to carry out said contracts entered into verbal agreements with various owners of trucks for the purpose of transporting bulk construction material from stockpiles, quarries, or other locations, to the sites of the roads which they were constructing or resurfacing. The owners of these trucks were paid on an hourly, load or yard-mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others.

III.

The Commissioner of Internal Revenue, asserting that the truck owner-operators and drivers were not the employees of the plaintiffs and that the truck owners were persons engaged in the business of transporting property for hire, assessed a tax against plaintiffs equal to 3% of the amounts allegedly paid by plaintiffs to said truck owners on an hourly, load or yard-mile basis during the aforesaid period, together with penalties and interest thereon.

IV.

That attached hereto, marked Exhibit "A," and by reference made a part hereof, is a representative

form of statement by the plaintiffs to their truck owners. In this instance the truck owner, George Greenberg, owned two trucks, one of which was driven by himself and one by another truck driver. Each truck owner was charged back against the amount due on an hourly, load or yard-mile basis the amount shown thereon as wages to himself and truck drivers, and a 10% payroll insurance item.

Plaintiffs, on or about October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on or about November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue, their claim for refund of \$893.87, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

Plaintiffs' Contentions

I.

That all of said truck drivers were employees of the plaintiffs and that said truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

II.

That all of the transportation taxes in question

were illegally assessed against plaintiffs by the Commissioner of Internal Revenue and illegally collected by defendant from plaintiffs.

Defendants' Contentions

I.

That the truck owners were "persons engaged in the business of transporting property for hire," and, as such, were liable for collecting from the plaintiffs the tax imposed by Section 3475 of the Internal Revenue Code, and for filing returns (on Form 727) for all taxes so collected, and the plaintiffs were liable for paying the tax.

II.

That the drivers of the trucks, to the extent that they drove their own trucks, were not employees of the plaintiffs, but were "persons engaged in the business of transporting property for hire."

III.

That the drivers of the trucks, to the extent that they did not drive their own trucks, were not employees of the plaintiffs, but were the employees of the owner of the truck which they drove.

Issues of Fact and Law to Be Determined

I.

Whether the drivers of the trucks, to the extent that they drove their own trucks, were employees of the plaintiffs, or whether they were persons engaged in the business of transporting property for

hire within the purview of Section 3475 of the Internal Revenue Code (Title 26, U.S.C. 3475).

II.

Whether the drivers of the trucks, to the extent that they did not drive their own trucks, were employees of the plaintiffs or employees of the owners of the trucks, and the owners were persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code (Title 26, U.S.C. 3475).

III.

Whether plaintiffs are entitled to a refund of the taxes, penalties and interest paid by them as prayed for in the complaint herein.

Exhibits

Plaintiff introduced in evidence as their only pre-trial exhibit certain work sheets showing, during the period involved, the names of the owners of the trucks and the number of trucks owned by them, amounts paid on an hourly, load or yard-mile basis, less deductions claimed to be paid as wages to drivers of the trucks and other adjustments and settlements made with truck owners; defendant introduced no exhibits at the pre-trial conference.

It is agreed by the parties that this pre-trial order will govern the course of the trial and will not be amended except by consent or to prevent manifest injustice.

The court finding that the foregoing clearly and

accurately reflects the pre-trial conference had herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings in all things and does hereby

Order that the said pre-trial order be and the same is hereby incorporated into and hereby made a part of the record in this case for the purpose of controlling the course of proceedings on the formal trial hereof before the court.

Dated this 4th day of April, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

Approved:

/s/ CHARLES P. DUFFY,
Of Attorneys for Plaintiffs.

/s/ THOMAS R. WINTER,
Of Attorneys for Defendant.

EXHIBIT "A"

Babler Bros.
Contractors
4617 S. E. Milwaukie Ave.
Portland 2, Oregon

TO George Greenberg DR.
Tillamook, Oregon

Oct. 6, 1945

Crater Lake-Fort Klamath Timber Access Road
Contract #2735.

Truck #1	4139½	yard mile haul	@ .09¢	per yd. mile	\$372.55
Truck #3	3866½	" " "	@ .09¢	" " "	347.99

Total Credits.....	\$720.54
--------------------	----------

Less:

Payroll—Greenberg	\$103.95
Webb	111.10

	215.05	
10% payroll insurance	21.50	\$236.55

Final payment	Amount of this check	\$483.99
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Paid by Check #717
October 6, 1945

Voucher 208

[Endorsed]: Filed April 4, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial without a jury before the Honorable Claude McColloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 4th day of April, 1949, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon; and

The parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pre-trial order previously made and entered herein; and

The court having thereafter considered fully all matters of fact and law presented by the parties and being at this time fully advised, does make the following

Findings of Fact

I.

Plaintiffs instituted this action to recover taxes on amounts paid for the transportation of property, together with penalties and interest thereon, assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code. Jurisdiction of this action is based on Title 28, United States Code, Section 1340.

II.

During the period from April 1, 1945, to December 31, 1945, Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, plaintiffs herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs entered into several contracts whereby they undertook certain road construction and resurfacing work, and in order to carry out said contracts entered into verbal lease agreements with various owners of trucks for the purpose of transporting bulk

construction material from stockpiles, quarries and other locations to the sites of the roads which they were constructing or resurfacing. The owners of these trucks were paid a rental on an hourly, load or yard-mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others.

III.

The Commissioner of Internal Revenue, asserting that the truck owner-operators and drivers were not the employees of the plaintiffs and that the truck owners were persons engaged in the business of transporting property for hire, assessed a tax against the plaintiffs equal to 3% of the amounts paid by plaintiffs to said truck owner-operators and drivers during the aforesaid period, together with penalties and interest thereon.

IV.

Plaintiffs on October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue their claim for refund of \$893.87, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

V.

All of said truck drivers, whether they were truck owners or not, were subject to the will and control of the plaintiffs, not only as to what should be done but how it should be done, and plaintiffs had the right to discharge said truck drivers, whether truck owners or not, at any time.

From the foregoing Findings of Fact, the court draws the following

Conclusions of Law

I.

That all of said truck drivers, whether truck owners or not, were employees of the plaintiffs during the period in question.

II.

That said truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

III.

That the hauling of the bulk construction materials from stock piles, quarries and other locations to the sites of the roads which plaintiffs were constructing or resurfacing did not constitute the transportation of property within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

IV.

That all of the transportation taxes in question were illegally assessed against plaintiffs by the Commissioner of Internal Revenue and illegally collected by defendant from plaintiffs.

V.

That by reason of the foregoing plaintiffs are entitled to recover judgment against defendant for the sum of \$893.87, together with interest thereon at the rate of 6% per annum from October 20, 1947, and for their costs and disbursements incurred herein.

Dated at Portland, Oregon, this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

Receipt of a copy of the within proposed Findings of Fact and Conclusions of Law is hereby acknowledged this 25th day of May, 1949.

/s/ GENE B. CONKLIN,
Of Attorneys for Defendant.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

JUDGMENT

This cause, having come on regularly for trial without a jury before the Honorable Claude Mc-

Colloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 4th day of April, 1949, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon, and the parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pre-trial order previously made and entered herein, and

The court having considered fully all matters of fact and law presented by the parties, and Findings of Fact and Conclusions of Law having been submitted by plaintiffs, which Findings of Fact and Conclusions of Law have heretofore been signed by the court and entered of record on the .. day of May, 1949,

Now Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Considered, Ordered and Adjudged that plaintiffs have and recover judgment of and from defendant for the sum of \$893.87, together with interest thereon at the rate of 6 per cent per annum from October 20, 1947, and for their costs and disbursements incurred herein.

Dated at Portland, Oregon, this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE
UNITED STATES COURT OF APPEALS

Notice is hereby given that Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 26, 1949 in favor of the plaintiffs.

Dated this 25th day of June, 1949.

HENRY L. HESS,

United States Attorney for
the District of Oregon,

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

CERTIFICATE OF SERVICE BY MAIL

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Notice of Appeal to the United States Court of Appeals by depositing in the United States Post Office at Portland, Oregon, on the 25th day of June, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid addressed to Carl E. Davidson and Charles P. Duffy, Attorneys at Law, 1525 Yeon Building,

Portland 4, Oregon, Attorneys of record for Plaintiffs.

/s/ GENE B. CONKLIN,
Assistant U. S. Attorney.

[Endorsed]: Filed June 25, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH DEFENDANT INTENDS TO RELY ON APPEAL

The Defendant, having taken appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Judgment rendered by the District Court of the United States for the District of Oregon, hereby designates the following points to be relied on in the prosecution of said appeal:

I.

The District Court erred in finding that plaintiffs entered into lease agreements with various owners of trucks for the purpose of transporting bulk construction material from stockpiles, quarries and other locations to the sites of the roads and airports which they were constructing.

II.

The District Court erred in finding that plaintiffs entered into similar agreements with the truck owners for the purpose of transporting some of their employees to the site of the construction job.

III.

The District Court erred in finding that the truck owners were paid a rental on an hourly, load or yard-mile basis.

IV.

The District Court erred in finding that all of the truck drivers were subject to the will and control of the plaintiffs not only as to what should be done, but how it should be done.

V.

The District Court erred in entering each and every conclusion of law.

VI.

The District Court erred in entering judgment for plaintiffs.

VII.

The District Court erred in not entering judgment for defendant.

Dated this 27th day of July, 1949, at Portland, Oregon.

HENRY L. HESS,

United States Attorney for
the District of Oregon,

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify

that I have made service upon the plaintiffs of the foregoing Statement of Points on Which Defendant Intends to Rely on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 27th day of July, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for plaintiffs.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To the Clerk of the District Court of the United States for the District of Oregon:

Defendant, Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, hereby designates the entire record in this case to be contained in the record on appeal which is described as follows:

1. All pleadings.
2. Pre-Trial Order.
3. Transcript of proceedings of the trial.
4. All trial exhibits.
5. Findings of Fact and Conclusions of Law.

6. Judgment.

7. Notice of Appeal to the Circuit Court of Appeals.

8. Statement of Points on Which Plaintiff Intends to Rely on Appeal.

9. This designation.

Dated this 27th day of July, 1949, at Portland, Oregon.

HENRY L. HESS,

United States Attorney for
the District of Oregon,

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Designation of Contents of Record on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 27th day of July, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for plaintiffs.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

ORDER TRANSMITTING EXHIBITS

On motion of defendant and appellant herein, and good cause appearing therefor, it is hereby

Ordered that all of the exhibits and the transcript of proceedings in the above case be transmitted to the Circuit Court of Appeals, in connection with the appeal in this case.

Dated this 28th day of July, 1949, at Portland, Oregon.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 28, 1949.

[Title of District Court and Cause.]

DOCKET ENTRIES

Civil No. 4133

1948

June 21—Filed complaint.

June 21—Issued summons—to Marshal.

June 25—Filed summons with return of service.

Aug. 18—Filed answer.

Aug. 23—Entered order setting for pre-trial Sept.
27, 1948. Fee.

Sept. 27—Record of pre-trial & order continuing to
Oct. 26 for further pre-trial & trial. Fee.

Oct. 19—Filed praecipe U. S. for issuance of subpoenas.

1948

Oct. 19—Filed praecipe U. S. for issuance of subpoena duces tecum.

Oct. 20—Issued subpoena—to Marshal.

Oct. 20—Issued subpoena duces tecum—to Marshal.

Oct. 21—Entered order canceling pre-trial & trial dates. Fee.

Oct. 26—Filed (3) Subpoena duces tecum.

1949

Feb. 7—Entered order setting for trial on April 5, 1949. McC.

Mar. 29—Entered order resetting for trial on April 4, 1949. 1:30 P.M. McC.

Apr. 1—Filed praecipe U. S. for subpoenas.

Apr. 1—Issued 4 subpoenas—to Marshal.

Apr. 2—Filed defendant's motion for subpoena duces tecum.

Apr. 2—Filed and entered order for subpoena duces tecum. McC.

Apr. 2—Issued subpoena duces tecum—to Marshal.

Apr. 4—Filed and entered pre-trial order. McC.

Apr. 4—Record of trial before court, order consolidating for trial with Civ. 4134 and 4135 and order for plaintiff to submit brief in 2 weeks; defendants 3 weeks thereafter and plaintiff 1 week thereafter. McC.

Apr. 6—Filed subpoena duces tecum with Marshal's return.

Apr. 6—Filed 4 subpoenas with Marshal's return.

Apr. 11—Filed exhibits 1 to 4 inc.

1949

Apr. 18—Filed plaintiffs brief.

May 13—Filed brief of defendant.

May 20—Entered order that plaintiff prepare Findings of Fact, Conclusions and Judgment. McC.

May 20—Filed plaintiff's reply brief.

May 26—Filed and entered Findings of Fact and Conclusions of Law. McC.

May 26—Filed and entered judgment for plaintiff for \$893.87 together with interest at 6% from Oct. 20, 1947. McC.

June 1—Filed cost bill of plaintiff.

June 25—Filed notice of appeal to the United States Court of Appeals.

July 27—Filed designation of contents of record on appeal.

July 27—Filed statement of points on which defendant intends to rely on appeal.

July 28—Filed and entered order to forward exhibits. McC.

July 28—Filed transcript of proceedings, Apr. 4, 1949.

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, answer, pre-trial order, findings of fact and conclusions of law, judgment, notice of appeal, statement of points, designation of contents of rec-

ord, order to send original exhibits, transcript of docket entries, and this certificate constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4133, in which Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, dba Lloyd Babler, are plaintiffs and appellees, and Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, is appellant and defendant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate transcript of testimony dated April 4, 1949, filed in this office in this cause, together with exhibits 1 to 4 inclusive.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 1st day of August, 1949.

LOWELL MUNDORFF,

Clerk,

[Seal] By /s/ P. L. BUCK,

Chief Deputy.

[Endorsed]: No. 12317 United States Court of Appeals for the Ninth Circuit. Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Appellant vs. Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, doing business as Lloyd Babler, Appellees. Transcript of Record. In two volumes. Volume I Appeal from the United States District Court for the District of Oregon.

Filed August 3, 1949.

Clerk of the United States Court of Appeals for the Ninth Circuit.

/s/ PAUL P. O'BRIEN,

No. 12318

United States
Court of Appeals
For the Ninth Circuit.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Appellant,

vs.

J. N. CONLEY, M. J. CONLEY and LLOYD
BABLER, doing business as Babler and
Conley,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

HENRY L. HESS,
United States Attorney, and

GENE B. CONKLIN,
Assistant United States Attorney,
Room 506 United States Court House,
Portland, Oregon.

THOMAS R. WINTER,
Special Assistant to Chief Counsel,
Treasury Department,
713 Smith Tower Building,
Seattle, Washington.

For Appellant.

CARL E. DAVIDSON and
CHARLES P. DUFFY,
1525 Yeon Building,
Portland, Oregon.

For Appellees.

In the District Court of the United States
for the District of Oregon

Civil No. 4134

J. N. CONLEY, M. J. CONLEY, and
LLOYD BABLER, dba Babler and Conley,
Plaintiffs,

v.

HUGH H. EARLE, Collector of Internal
Revenue for the District of Oregon,
Defendant.

COMPLAINT

I.

This is an action for the recovery of taxes on amounts paid for the transportation of property and persons, together with penalties and interest thereon, illegally assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant, purporting to act under the authority of Section 3475 and Section 3469 of the Internal Revenue Code of the United States, Title 26, Sections 3475 and 3469, United States Code. Jurisdiction of this action is based on Section 24 (5) of the Judicial Code of the United States, Title 28, Section 41, Subdivision 5, United States Code.

II.

During the period from May 1, 1944, to April 1, 1945, J. N. Conley, M. J. Conley and Lloyd Babler, plaintiffs herein, were engaged as partners in a gen-

eral contracting business. As a part of said business, plaintiffs employed certain truck drivers to transport road materials and persons for them and paid said truck drivers at a specified rate.

III.

The Commissioner of Internal Revenue, wrongfully asserting that said truck drivers were not the employees of the plaintiffs but that they were persons engaged in the business of transporting property and persons for hire, assessed a tax against plaintiffs on the amounts so paid by plaintiffs to said truck drivers during the aforesaid period, together with penalties and interest thereon.

IV.

Plaintiffs, on or about October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on or about November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue their claim for refund of \$173.11, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

Wherefore, plaintiffs pray for judgment against defendant in the sum of \$173.11, with interest there-

on from the date of payment, and for their costs and disbursements incurred herein.

/s/ CARL E. DAVIDSON,

/s/ CHARLES P. DUFFY,

1525 Yeon Building,

Portland 4, Oregon.

Attorneys for Plaintiffs.

[Endorsed]: Filed June 21, 1948.

[Title of District Court and Cause.]

ANSWER

The defendant, by his attorney, Henry L. Hess, Esquire, United States Attorney for the District of Oregon, in answer to the complaint states:

I.

The allegations contained in paragraph I of the complaint are admitted except it is denied that the taxes, together with penalties and interest thereon, were illegally assessed against and collected from the plaintiffs.

II.

The allegations contained in paragraph II of the complaint are denied except it is admitted that during the period from May 1, 1944 to April 1, 1945 J. N. Conley, M. J. Conley and Lloyd Babler were engaged as partners in a general contracting business.

III.

The allegations contained in paragraph III of the complaint are denied except it is admitted that transportation taxes, interest and penalties in the total amount of \$173.11 were assessed against plaintiffs.

IV.

The allegations contained in paragraph IV of the complaint are admitted.

Wherefore, the defendant prays that plaintiffs' complaint be dismissed with costs to be assessed against the plaintiffs.

HENRY L. HESS,

United States Attorney,

Attorney for the Defendant.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America

District of Oregon, ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon and one of defendant's attorneys herein, hereby certify that I have made service of the foregoing Answer upon the plaintiff by depositing a duly certified copy thereof in the U. S. Post Office at Portland, Oregon, on the 18th day of August, 1948, enclosed in an envelope with postage thereon prepaid addressed to Messrs. Carl E. Davidson and Charles P. Duffy,

1525 Yeon Building, Portland 4, Oregon, attorneys
of record for plaintiff.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed Aug. 18, 1948.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause having come on regularly for a pre-trial conference before the Honorable James Alger Fee, one of the Judges of the above-entitled court, at Portland, Oregon, on the 27th day of September, 1948, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon, and the following proceedings were had and done:

Admitted Facts

It appears from the pleadings and the pre-trial proceedings that the following facts are admitted and may be taken and deemed by the court on the trial of this action as established facts therein:

I.

This is an action for the recovery of taxes on amounts paid for the transportation of property and persons, together with penalties and interest thereon, assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant,

purporting to act under the authority of Section 3475 and Section 3469 of the Internal Revenue Code of the United States, Title 26, Sections 3475 and 3469, United States Code. Jurisdiction of this action is based on Title 28, United States Code, Section 1340.

II.

During the period from May 1, 1944, to April 1, 1945, J. N. Conley, M. J. Conley and Lloyd Babler, plaintiffs herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs entered into several contracts whereby they undertook certain road construction and resurfacing work on a marine base at Klamath Falls, Oregon, and other locations, and in order to carry out said contracts, entered into verbal agreements with various owners of trucks for the purpose of transporting bulk construction material from stockpiles, quarries, or other locations, to the sites of the roads and the marine base, which they were constructing or resurfacing. The owners of these trucks were paid on an hourly, load or yard-mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others; plaintiffs also, during said period, entered into an oral agreement with one or more truck owners for the purpose of transporting workers to or from a construction job.

III.

The Commissioner of Internal Revenue asserting that said truck owner-operators and drivers were

not the employees of the plaintiffs and that the truck owners were persons engaged in the business of transporting property for hire; and asserting that to the extent that workers were transported, the amounts paid to the truck owners were taxable as amounts paid for the transportation of persons by motor vehicle, assessed transportation taxes against the plaintiffs equal to 3% or 15%, respectively, of the amounts allegedly paid by plaintiffs to said truck owners on an hourly, load or yard-mile basis during the aforesaid period, together with penalties and interest thereon.

IV.

That attached hereto, marked Exhibit "A," and by reference made a part hereof, is a representative form of statement by the plaintiffs to their truck owners. In this instance the truck owner, George Greenberg, owned two trucks, one of which was driven by himself and one by another truck driver. Each truck owner was charged back against the amount due on an hourly, load or yard-mile basis the amount shown thereon as wages to himself and truck drivers, and a 10% payroll insurance item.

Plaintiffs, on or about October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed under Section 3475 and Section 3469 of the Internal Revenue Code, and thereafter and on or about November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal

Revenue, their claim for refund of \$173.11, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

Plaintiffs' Contentions

I.

That all of said truck drivers were employees of the plaintiffs and that said truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

II.

That the amounts paid for the transportation of plaintiffs' employees were not taxable under the provisions of Section 3469 of the Internal Revenue Code of the United States, Title 26, Section 3469, United States Code.

III.

That all of the transportation taxes in question were illegally assessed against plaintiffs by the Commissioner of Internal Revenue and illegally collected by defendant from plaintiffs.

Defendant's Contentions

I.

That to the extent that the trucks were used for

the transportation of property, the truck owners were "persons engaged in the business of transporting property for hire," and, as such, were liable for collecting from the plaintiffs the tax imposed by Section 3475 of the Internal Revenue Code, and for filing returns (on Form 727) for all taxes so collected, and the plaintiffs were liable for paying the tax; that to the extent that the trucks were used for the transportation of workers, the amounts paid to the truck owners were taxable as "amounts paid * * * for the transportation * * * of persons * * * by motor vehicle" under Section 3469 of the Internal Revenue Code.

II.

That the drivers of the trucks, to the extent that they drove their own trucks, were not employees of the plaintiffs but were "persons engaged in the business of transporting property for hire."

III.

That the drivers of the trucks, to the extent that they did not drive their own trucks, were not employees of the plaintiffs, but were the employees of the owner of the truck which they drove.

Issues of Fact and Law to be Determined

I.

Whether the drivers of the trucks, to the extent that they drove their own trucks, were employees of the plaintiffs, or whether they were persons engaged in the business of transporting property

for hire within the purview of Section 3475 of the Internal Revenue Code (Title 26, U.S.C. 3475).

II.

Whether the drivers of the trucks, to the extent that they did not drive their own trucks were employees of the plaintiffs or employees of the owners of the trucks, and the owners were persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code (Title 26, U.S.C. 3475).

III.

Whether or not the amounts paid for the transportation of plaintiffs' employees were taxable under the provisions of Section 3469 of the Internal Revenue Code of the United States, Title 26, Section 3469, United States Code.

IV.

Whether plaintiffs are entitled to a refund of the taxes, penalties and interest paid by them as prayed for in the complaint herein.

Exhibits

Plaintiffs introduced in evidence as their only pre-trial exhibit certain work sheets showing, during the period involved, the names of the owners of the trucks and the number of trucks owned by them, amounts paid on an hourly, load or yard-mile basis, less deductions claimed to be paid as wages to drivers of the trucks and other adjust-

ments and settlements made with truck owners; defendant introduced no exhibits at the pre-trial conference.

It is agreed by the parties that this pre-trial order will govern the course of the trial and will not be amended except by consent or to prevent manifest injustice.

The court finding that the foregoing clearly and accurately reflects the pre-trial conference had herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings in all things and does hereby

Order that the said pre-trial order be and the same is hereby incorporated into and hereby made a part of the record in this case for the purpose of controlling the course of proceedings on the formal trial hereof before the court.

Dated this 4th day of April, 1948.

/s/ CLAUDE McCOLLOCH,

Approved:

/s/ CHARLES P. DUFFY,

of Attorneys for Plaintiffs.

/s/ THOMAS R. WINTER,

of Attorneys for Defendant.

EXHIBIT "A"

Babler Bros.
Contractors
4617 S. E. Milwaukie Ave.
Portland 2, Oregon

TO George Greenberg DR.
Tillamook, Oregon

Oct. 6, 1945

Crater Lake-Fort Klamath Timber Access Road
Contract #2735.

Truck #1	4139½ yard mile haul	@ .09¢ per yd. mile	\$372.55
Truck #3	3866½ " " "	@ .09¢ " " "	347.99
Total Credits.....			\$720.54

Less:			
	Payroll—Greenberg	\$103.95	
	Webb	111.10	
		<hr/> 215.05	
	10% payroll insurance	21.50	\$236.55
		<hr/>	<hr/>
Final payment	Amount of this check		\$483.99

Paid by Check #717
October 6, 1945

Voucher 208

[Endorsed]: Filed April 4, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause having come on regularly for trial without a jury before the Honorable Claude McCulloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 4th day of April, 1949, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon; and

The parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pretrial order previously made and entered herein; and

The court having thereafter considered fully all matters of fact and law presented by the parties and being at this time fully advised, does make the following

Findings of Fact

I.

Plaintiffs instituted this action to recover taxes on amounts paid for the transportation of property and persons, together with penalties and interest thereon, assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant purporting to act under the authority of Section 3475 and Section 3469 of the Internal Revenue Code of the United States, Title 26, Sections 3475 and 3469, United States Code. Jurisdiction of this action is based on Title 28, United States Code, Section 1340.

II.

During the period from May 1, 1944, to April 1, 1945, J. N. Conley, M. J. Conley and Lloyd Babler, plaintiffs herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs entered into several contracts whereby they undertook certain road construction and resurfacing work on a marine base at Klamath Falls, Oregon, and on other locations, and in order to carry out said contracts entered into verbal lease

agreements with various owners of trucks for the purpose of transporting bulk construction material from stock piles, quarries and other locations to the sites of the roads and marine base which they were constructing or resurfacing. The owners of these trucks were paid a rental on an hourly, load or yard-mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others. Plaintiffs also during said period entered into similar agreements with the truck owners for the purpose of transporting some of their employees to the site of the construction job.

III.

The Commissioner of Internal Revenue, asserting that the truck owner-operators and drivers were not the employees of the plaintiffs and that the truck owners were persons engaged in the business of transporting property for hire, and asserting that to the extent that plaintiffs' employees were transported, the amounts paid to the truck owners were taxable as amounts paid for the transportation of persons by motor vehicle, assessed transportation taxes against the plaintiffs equal to 3% or 15%, respectively, of the amounts paid by plaintiffs to said truck owner-operators and drivers during the aforesaid period, together with penalties and interest thereon.

IV.

Plaintiffs on October 20, 1947, under threat of seizure and sale of their property by defend-

ant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed under Section 3475 and Section 3469 of the Internal Revenue Code, and thereafter and on November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue their claim for refund of \$173.11, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

V.

All of said truck drivers, whether they were truck owners or not, were subject to the will and control of the plaintiffs, not only as to what should be done but how it should be done, and plaintiffs had the right to discharge said truck drivers, whether truck owners or not, at any time.

From the foregoing Findings of Fact, the court draws the following

Conclusions of Law

I.

That all of said truck drivers, whether truck owners or not, were employees of the plaintiffs during the period in question.

II.

That said truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal

Revenue Code of the United States, Title 26, Section 3475, United States Code.

III.

That the hauling of the bulk construction materials from stock piles, quarries and other locations to the sites of the roads and marine base which they were constructing or resurfacing did not constitute the transportation of property within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

IV.

That the transportation of some of plaintiffs' employees to the sites of the construction job did not constitute the transportation of persons within the purview of Section 3469 of the Internal Revenue Code of the United States, Title 26, Section 3469, United States Code.

V.

That all of the transportation taxes in question were illegally assessed against plaintiffs by the Commissioner of Internal Revenue and illegally collected by defendant from plaintiffs.

VI.

That by reason of the foregoing plaintiffs are entitled to recover judgment against defendant for the sum of \$173.11, together with interest thereon at the rate of 6% per annum from October 20, 1947,

and for their costs and disbursements incurred herein.

Dated at Portland, Oregon, this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

Receipt of a copy of the within proposed Findings of Fact and Conclusions of Law is hereby acknowledged this 25th day of May, 1949.

/s/ GENE B. CONKLIN,
of Attorneys for Defendant.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

JUDGMENT

This cause, having come on regularly for trial without a jury before the Honorable Claude McCulloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 4th day of April, 1949, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon, and the parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pretrial order previously made and entered herein, and

The court having considered fully all matters of

fact and law presented by the parties, and Findings of Fact and Conclusions of Law having been submitted by plaintiffs, which Findings of Fact and Conclusions of Law have heretofore been signed by the court and entered of record on the ————day of May, 1949,

Now Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

It is Hereby Considered, Ordered and Adjudged that plaintiffs have and recover judgment of and from defendant for the sum of \$173.11, together with interest thereon at the rate of 6 per cent per annum from October 20, 1947, and for their costs and disbursements incurred herein.

Dated at Portland, Oregon, this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed May 26, 1949.

—————

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS

Notice is hereby given that Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth

Circuit from the final judgment entered in this action on May 26, 1949 in favor of the plaintiffs.

Dated this 25th day of June, 1949.

HENRY L. HESS,

United States Attorney

for the District of Oregon.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

CERTIFICATE OF SERVICE BY MAIL

United States of America

District of Oregon, ss

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Notice of Appeal to The United States Court of Appeals by Depositing in the United States Post Office at Portland, Oregon, on the 25th day of June, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon pre-paid, addressed to Carl E. Davidson and Charles P. Duffy, Attorneys at Law, 1525 Yeon Building, Portland 4, Oregon, Attorneys of record for Plaintiffs.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

[Endorsed]: Filed June 25, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH DEFENDANT INTENDS TO RELY ON APPEAL

The Defendant, having taken appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Judgment rendered by the District Court of the United States for the District of Oregon, hereby designates the following points to be relied on in the prosecution of said appeal:

I.

The District Court erred in finding that plaintiffs entered into lease agreements with various owners of trucks for the purpose of transporting bulk construction material from stockpiles, quarries and other locations to the sites of the roads and airports which they were constructing.

II.

The District Court erred in finding that plaintiffs entered into similar agreements with the truck owners for the purpose of transporting some of their employees to the site of the construction job.

III.

The District Court erred in finding that the truck owners were paid a rental on an hourly, load or yard-mile basis.

IV.

The District Court erred in finding that all of

the truck drivers were subject to the will and control of the plaintiffs not only as to what should be done, but how it should be done.

V.

The District Court erred in entering each and every conclusion of law.

VI.

The District Court erred in entering judgment for plaintiffs.

VII.

The District Court erred in not entering judgment for defendant.

Dated this 27th day of July, 1949, at Portland, Oregon.

HENRY L. HESS,

United States Attorney

for the District of Oregon.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,

District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Statement of Points on Which Defendant Intends to Rely on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 27th day of July, 1949, a duly certified copy thereof, enclosed in an envelope, with postage

thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for plaintiffs.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the District Court of the United
States for the District of Oregon:

Defendant, Hugh H. Earle, Collector of Internal Revenue for the District of Oregon hereby designates the entire record in this case to be contained in the record on appeal which is described as follows:

1. All pleadings.
2. Pre-trial Order.
3. Transcript of proceedings of the trial.
4. All trial exhibits.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Notice of Appeal to the Circuit Court of Appeals.
8. Statement of Points on Which Plaintiff Intends to Rely on Appeal.
9. This designation.

Dated this 27th day of July, 1949, at Portland, Oregon.

HENRY L. HESS,

United States Attorney for
the District of Oregon.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Designation of Contents of Record on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 27th day of July, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for plaintiffs.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

ORDER TRANSMITTING EXHIBITS

On motion of defendant and appellant herein, and good cause appearing therefor, it is hereby

Ordered that all of the exhibits and the tran-

script of proceedings in the above case be transmitted to the Circuit Court of Appeals, in connection with the appeal in this case.

Dated this 28th day of July, 1949, at Portland, Oregon.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 28, 1949.

[Title of District Court and Cause.]

DOCKET ENTRIES
Civil No. 4134

1948

June 21—Filed Complaint.

June 21—Issued summons—to Marshal.

June 25—Filed summons with return of service.

Aug. 18—Filed answer.

Aug. 23—Entered order setting for pre-trial conference Sept. 27, 1948. Fee.

Sept. 27—Record of pre-trial & order continuing to Oct. 26 for further pre-trial and trial. Fee.

Oct. 19—Filed praecipe U. S. for issuance of subpoenas.

Oct. 19—Filed praecipe U. S. for issuance of subpoena duces tecum.

Oct. 20—Issued subpoenas—to Marshal.

Oct. 20—Issued subpoena duces tecum—to Marshal.

Oct. 21—Entered order canceling pre-trial & trial. Fee.

1948

Oct. 26—Filed (3) subpoenas.

Oct. 26—Filed subpoena Duces Tecum.

1949

Feb. 7—Entered order setting for trial on April 5, 1949. McC.

Mar. 29—Entered order resetting for trial on April 4, 1949, 1:30 p.m. McC.

Apr. 1—Filed praecipe U. S. for subpoenas—issued 4 subpoenas—to Marshal.

Apr. 2—Filed def's motion for subpoena duces tecum.

Apr. 2—Filed & entered order for subpoena duces tecum. McC.

Apr. 2—Issued subpoena duces tecum—to Marshal.

Apr. 4—Filed & entered pre-trial order. McC.

Apr. 4—Record of trial before court; order consolidating with Civ. 4133 & 4135; & order for ptff to submit brief in 2 weeks; deft. 3 weeks thereafter & deft. 1 week thereafter. McC.

Apr. 6—Filed subpoena duces tecum with Marshal's return.

Apr. 11—Filed exhibits 1 to 4 inc.

Apr. 18—Filed ptff's brief.

May 13—Filed deft's brief.

May 20—Entered order that plaintiff prepare Findings of Fact, Conclusions and Judgment. McC.

May 26—Filed & entered Findings of Fact & Conclusions of Law. McC.

1949

May 26—Filed & entered judgment for ptff for \$173.11 with interest at 6% from Oct. 20, 1947. McC.

June 1—Filed cost bill of plntf.

June 25—Filed notice of appeal to the United States Court of Appeals, by U. S.

July 27—Filed designation of contents of record of appeal.

July 27—Statement of points on which defendant intends to rely on appeal.

July 28—Filed & entered order to forward exhibits. McC.

July 28—Filed Transcript of Proceedings April 4, 1949.

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, answer, pre-trial order, findings of fact and conclusions of law, judgment, notice of appeal, statement of points, designation of contents of record, order to send original exhibits, transcript of docket entries, and clerk's certificate, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4134, J. N. Conley, M. J. Conley, and Lloyd Babler, dba Babler and Conley, plaintiffs and appellees, and Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, is defendant and appellant; that

the said record has been prepared by me in accordance with the said designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the duplicate transcript of testimony and exhibits 1 to 4, inclusive, which went forward with cause Civil 4133, Babler et al vs. Earle, were used jointly with this case and Civil 4135, J. N. Conley et al. vs. Earle.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 1st day of August, 1949.

LOWELL MUNDORFF,

Clerk.

[Seal] By /s/ F. L. BUCK,

Chief Deputy.

[Endorsed]: No. 12318. United States Court of Appeals for the Ninth Circuit. Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Appellant, vs. J. N. Conley, M. J. Conley and Lloyd Babler, Doing Business as Babler and Conley, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed August 3, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12319

United States
Court of Appeals
For the Ninth Circuit.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Appellant,

vs.

J. N. CONLEY, M. J. CONLEY, HARRY
BABLER and LLOYD BABLER, doing business as Babler Brothers,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

NAMES AND ADDRESSES OF ATTORNEYS

HENRY L. HESS,

United States Attorney, and

GENE B. CONKLIN,

Assistant United States Attorney,

Room 506 United States Court House,
Portland, Oregon.

THOMAS R. WINTER,

Special Assistant to Chief Counsel,

Treasury Department,

713 Smith Tower Building,

Seattle, Washington,

For Appellant.

CARL E. DAVIDSON and

CHARLES P. DUFFY,

1525 Yeon Building,

Portland, Oregon,

For Appellees.

In the District Court of the United States for the
District of Oregon

Civil No. 4135

J. N. CONLEY, M. J. CONLEY, HARRY BAB-
LER and LLOYD BABLER, dba Babler
Brothers,

Plaintiffs,

vs.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Defendant.

COMPLAINT

I.

This is an action for the recovery of taxes on amounts paid for the transportation of property, together with penalties and interest thereon, illegally assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant, purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code. Jurisdiction of this action is based on Section 24 (5) of the Judicial Code of the United States, Title 28, Section 41, Subdivision 5, United States Code.

II.

During the period from December 1, 1942, to May 1, 1944, J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler, plaintiffs herein, were engaged

as partners in a general contracting business. As a part of said business, plaintiffs employed certain truck drivers to transport road materials for them and paid said truck drivers at a specified rate.

III.

The Commissioner of Internal Revenue, wrongfully asserting that said truck drivers were not the employees of the plaintiffs but that they were persons engaged in the business of transporting property for hire, assessed a tax against plaintiffs equal to 3% of the amounts so paid by plaintiffs to said truck drivers during the aforesaid period, together with penalties and interest thereon.

IV.

Plaintiffs, on or about October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on or about November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue their claim for refund of \$4,537.15, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

Wherefore, plaintiffs pray for judgment against defendant in the sum of \$4,537.15, with interest

thereon from the date of payment, and for their costs and disbursements incurred herein.

/s/ CARL E. DAVIDSON,

/s/ CHARLES P. DUFFY,

1525 Yeon Building, Portland

4, Oregon,

Attorneys for Plaintiffs.

[Endorsed]: Filed June 21, 1948.

[Title of District Court and Cause.]

ANSWER

The defendant, by his attorney, Henry L. Hess, Esquire, United States Attorney for the District of Oregon, in answer to the complaint, states:

I.

The allegations contained in paragraph I of the complaint are admitted except it is denied that the taxes, together with penalties and interest thereon, were illegally assessed against and collected from the plaintiffs.

II.

The allegations contained in paragraph II of the complaint are denied except it is admitted that during the period from December 1, 1942, to May 1, 1944, J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler were engaged as partners in a general contracting business.

III.

The allegations contained in paragraph III of the complaint are denied except it is admitted that transportation taxes, interest and penalties in the total amount of \$4,537.15 were assessed against plaintiffs.

IV.

The allegations contained in paragraph IV of the complaint are admitted.

Wherefore, the defendant prays that plaintiffs' complaint be dismissed with costs to be assessed against the plaintiffs.

HENRY L. HESS,

United States Attorney,

Attorney for the Defendant.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,

District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon and one of defendant's attorneys herein, hereby certify that I have made Service of the foregoing Answer on the plaintiff by depositing a duly certified copy thereof in the U. S. Post Office at Portland, Oregon, on the 18th day of August, 1948, enclosed in an envelope with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Building, Portland 4, Oregon, attorneys of record for plaintiff.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed Aug. 18, 1948.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause having come on regularly for a pre-trial conference before the Honorable James Alger Fee, one of the Judges of the above-entitled court, at Portland, Oregon, on the 27th day of September, 1948, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon, and the following proceedings were had and done:

Admitted Facts

It appears from the pleadings and the pre-trial proceedings that the following facts are admitted and may be taken and deemed by the court on the trial of this action as established facts therein:

I.

This is an action for the recovery of taxes on amounts paid for the transportation of property, together with penalties and interest thereon, assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant, purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code. Jurisdiction of this action is based on Title 28, United States Code, Section 1340.

II.

During the period from December 1, 1942, to May 1, 1944, J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler, plaintiffs herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs entered into several contracts whereby they undertook certain construction work on roads and airports at Redmond, Oregon; Salem, Oregon; and Klamath Falls, Oregon, and in order to carry out said contracts, entered into verbal agreements with various owners of trucks for the purpose of transporting bulk construction material from stockpiles, quarries or other locations to the sites of the roads and airports which they were constructing. The owners of these trucks were paid on an hourly, load or yard-mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others.

III.

The Commissioner of Internal Revenue, asserting that the truck owner-operators and drivers were not the employees of the plaintiffs and that the truck owners were persons engaged in the business of transporting property for hire, assessed a tax against plaintiffs equal to 3% of the amounts allegedly paid by plaintiffs to said truck owners on an hourly, load or yard-mile basis during the aforesaid period, together with penalties and interest thereon.

IV.

That attached hereto, marked Exhibit "A," and by reference made a part hereof, is a representative form of statement by the plaintiffs to their truck owners. In this instance the truck owner, George Greenberg, owned two trucks, one of which was driven by himself and one by another truck driver. Each truck owner was charged back against the amount due on an hourly, load or yard-mile basis the amount shown thereon as wages to himself and truck drivers, and a 10% payroll insurance item.

Plaintiffs, on or about October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on or about November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue, their claim for refund of \$4,537.15, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

Plaintiffs' Contentions

I.

That all of said truck drivers were employees of the plaintiffs and that said truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

II.

That all of the transportation taxes in question were illegally assessed against plaintiffs by the Commissioner of Internal Revenue and illegally collected by defendant from plaintiffs.

Defendant's Contentions

I.

That the truck owners were "persons engaged in the business of transporting property for hire," and, as such were liable for collecting from the plaintiffs the tax imposed by Sections 3475 of the Internal Revenue Code, and for filing returns (on Form 727) for all taxes so collected, and the plaintiffs were liable for paying the tax.

II.

That the drivers of the trucks, to the extent that they drove their own trucks, were not employees of the plaintiffs, but were "persons engaged in the business of transporting property for hire."

III.

That the drivers of the trucks, to the extent that they did not drive their own trucks, were not employees of the plaintiffs, but were the employees of the owner of the truck which they drove.

Issues of Fact and Law to be Determined

I.

Whether the drivers of the trucks, to the extent that they drove their own trucks, were employees of

the plaintiffs, or whether they were persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code (Title 26, U.S.C. 3475).

II.

Whether the drivers of the trucks, to the extent that they did not drive their own trucks, were employees of the plaintiffs or employees of the owners of the trucks, and the owners were persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code (Title 26, U.S.C. 3475).

III.

Whether plaintiffs are entitled to a refund of the taxes, penalties and interest paid by them as prayed for in the complaint herein.

Exhibits

Plaintiffs introduced in evidence as their only pretrial exhibit certain work sheets showing, during the period involved, the names of the owners of the trucks and the number of trucks owned by them, amounts paid on an hourly, load or yard-mile basis, less deductions claimed to be paid as wages to drivers of the trucks and other adjustments and settlements made with truck owners; defendant introduced no exhibits at the pre-trial conference.

It is agreed by the parties that this pre-trial order will govern the course of the trial and will not be amended except by consent or to prevent manifest injustice.

The court finding that the foregoing clearly and accurately reflects the pre-trial conference had herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings in all things and does hereby

Order that the said pre-trial order be and the same is hereby incorporated into and hereby made a part of the record in this case for the purpose of controlling the course of proceedings on the formal trial hereof before the court.

Dated this 4th day of April, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

Approved:

/s/ CHARLES P. DUFFY,
of Attorneys for Plaintiffs.

/s/ THOMAS R. WINTER,
of Attorneys for Defendant.

EXHIBIT "A"

Babler Bros.
Contractors
4617 S. E. Milwaukie Ave.
Portland 2, Oregon

TO George Greenberg DR.
Tillamook, Oregon

Oct. 6, 1945

Crater Lake-Fort Klamath Timber Access Road
Contract #2735.

Truck #1	4139½	yard mile haul	@ .09¢ per yd. mile	\$372.55
Truck #3	3866½	" " "	@ .09¢ " " "	347.99
Total Credits.....				\$720.54

Less:			
	Payroll—Greenberg	\$103.95	
	Webb	111.10	
		<hr/>	
		215.05	
	10% payroll insurance	21.50	\$236.55
		<hr/>	
Final payment	Amount of this check		\$483.99
	Paid by Check #717		
	October 6, 1945		

Voucher 208

[Endorsed]: Filed April 4, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial without a jury before the Honorable Claude McColloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 4th day of April, 1949, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon; and

The parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pretrial order previously made and entered herein; and

The court having thereafter considered fully all matters of fact and law presented by the parties and being at this time fully advised, does make the following

Findings of Fact

I.

Plaintiffs instituted this action to recover taxes on amounts paid for the transportation of property, together with penalties and interest thereon, assessed by the Commissioner of Internal Revenue and collected from plaintiffs by defendant purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code. Jurisdiction of this action is based on Title 28, United States Code, Section 1340.

II.

During the period from December 1, 1942, to May 1, 1944, J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler, plaintiffs herein, were engaged as partners in a general contracting business. As a part of said business, plaintiffs entered into several contracts whereby they undertook certain construction work on roads and airports at Redmond, Oregon, Salem, Oregon, and Klamath Falls, Oregon, and in order to carry out said contracts entered into verbal lease agreements with various owners of trucks for the purpose of transporting bulk construction material from stock piles, quarries and other locations to the sites of the roads and airports which they were constructing. The owners of these trucks were paid a rental on an hourly, load or yard-mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others.

III.

The Commissioner of Internal Revenue, asserting that the truck owner-operators and drivers were not the employees of the plaintiffs and that the truck owners were persons engaged in the business of transporting property for hire, assessed a tax against the plaintiffs equal to 3% of the amounts paid by plaintiffs to said truck owner-operators and drivers during the aforesaid period, together with penalties and interest thereon.

IV.

Plaintiffs on October 20, 1947, under threat of seizure and sale of their property by defendant, paid to defendant the full amount of said transportation taxes, penalties and interest assessed, and thereafter and on November 7, 1947, plaintiffs filed with the defendant for transmission to the Commissioner of Internal Revenue their claim for refund of \$4,537.15, representing the amount of transportation taxes, penalties and interest paid. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on May 27, 1948.

V.

All of said truck drivers, whether they were truck owners or not, were subject to the will and control of the plaintiffs, not only as to what should be done but how it should be done, and plaintiffs had the right to discharge said truck drivers, whether truck owners or not, at any time.

From the foregoing Findings of Fact, the court draws the following

Conclusions of Law

I.

That all of said truck drivers, whether truck owners or not, were employees of the plaintiffs during the period in question.

II.

That said truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

III.

That the hauling of the bulk construction materials from stock piles, quarries and other locations to the sites of the roads and airports which they were constructing did not constitute the transportation of property within the purview of Section 3475 of the Internal Revenue Code of the United States, Title 26, Section 3475, United States Code.

IV.

That all of the transportation taxes in question were illegally assessed against plaintiffs by the Commissioner of Internal Revenue and illegally collected by defendant from plaintiffs.

V.

That by reason of the foregoing plaintiffs are entitled to recover judgment against defendant for

the sum of \$4,537.15, together with interest thereon at the rate of 6% per annum from October 20, 1947, and for their costs and disbursements incurred herein.

Dated at Portland, Oregon this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

Receipt of a copy of the within proposed Findings of Fact and Conclusions of Law is hereby acknowledged this 25th day of May, 1949.

/s/ GENE B. CONKLIN,
of Attorneys for Defendant.

[Endorsed]: Filed May 26, 1949.

In the District Court of the United States
for the District of Oregon
Civil No. 4135

J. N. CONLEY, M. J. CONLEY, HARRY
BABLER and LLOYD BABLER, dba Babler
Brothers,

Plaintiffs,

v.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Defendant.

JUDGMENT

This cause, having come on regularly for trial without a jury before the Honorable Claude Mc-

Colloch, one of the judges of the above-entitled court, at Portland, Oregon, on the 4th day of April, 1949, plaintiffs appearing by Charles P. Duffy, one of their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon, and the parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pretrial order previously made and entered herein, and

The court having considered fully all matters of fact and law presented by the parties, and Findings of Fact and Conclusions of Law having been submitted by plaintiffs, which Findings of Fact and Conclusions of Law have heretofore been signed by the court and entered of record on the day of May, 1949,

Now Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Considered, Ordered and Adjudged that plaintiffs have and recover judgment of and from defendant for the sum of \$4,537.15, together with interest thereon at the rate of 6 per cent per annum from October 20, 1947, and for their costs and disbursements incurred herein.

Dated at Portland, Oregon, this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE
UNITED STATES COURT OF APPEALS

Notice is hereby given that Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 26, 1949 in favor of the plaintiffs.

Dated this 25th day of June, 1949.

HENRY L. HESS,

U. S. Attorney

For the District of Oregon.

/s/ GENE B. CONKLIN,

Asst. U. S. Attorney.

CERTIFICATE OF SERVICE BY MAIL

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Notice of Appeal to the United States Court of Appeals by depositing in the United States Post Office at Portland, Oregon, on the 25th day of June, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid addressed to Carl E. Davidson and Charles P. Duffy,

Attorneys at Law, 1525 Yeon Building, Portland 4,
Oregon, Attorneys of record for Plaintiffs.

/s/ GENE B. CONKLIN,
Asst. U. S. Attorney.

[Endorsed]: Filed June 25, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH DE-
FENDANT INTENDS TO RELY ON APPEAL

The Defendant, having taken appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Judgment rendered by the District Court of the United States for the District of Oregon, hereby designates the following points to be relied on in the prosecution of said appeal:

I.

The District Court erred in finding that plaintiffs entered into lease agreements with various owners of trucks for the purpose of transporting bulk construction material from stockpiles, quarries and other locations to the sites of the roads and airports which they were constructing.

II.

The District Court erred in finding that plaintiffs entered into similar agreements with the truck owners for the purpose of transporting some of their employees to the site of the construction job.

III.

The District Court erred in finding that the truck owners were paid a rental on an hourly, load or yard-mile basis.

IV.

The District Court erred in finding that all of the truck drivers were subject to the will and control of the plaintiffs not only as to what should be done, but how it should be done.

V.

The District Court erred in entering each and every conclusion of law.

VI.

The District Court erred in entering judgment for plaintiffs.

VII.

The District Court erred in not entering judgment for defendant.

Dated this 27th day of July, 1949, at Portland, Oregon.

HENRY L. HESS,

U. S. Attorney

for the District of Oregon.

/s/ GENE B. CONKLIN,

Asst. U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify

that I have made service upon the plaintiffs of the foregoing Statement of Points on Which Defendant Intends to Rely on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 27th day of July 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for plaintiffs.

/s/ GENE B. CONKLIN,

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the District Court of the United States for the District of Oregon:

Defendant, Hugh H. Earle, Collector of Internal Revenue for the District of Oregon hereby designates the entire record in this case to be contained in the record on appeal which is described as follows:

1. All pleadings
2. Pre-trial Order
3. Transcript of proceedings of the trial
4. All trial exhibits
5. Findings of Fact and Conclusions of Law

6. Judgment

7. Notice of Appeal to the Circuit Court of Appeals

8. Statement of Points on Which Plaintiff Intends to Rely on Appeal

9. This designation.

Dated this 27th day of July, 1949, at Portland, Oregon.

HENRY L. HESS,

U. S. Attorney

for the District of Oregon.

/s/ GENE B. CONKLIN,

Asst. U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the plaintiffs of the foregoing Designation of Contents of Record on Appeal by depositing in the United States Post Office at Portland, Oregon, on the 27th day of July, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for plaintiffs.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

ORDER TRANSMITTING EXHIBITS

On motion of defendant and appellant herein, and good cause appearing therefor, it is hereby

Ordered that all of the exhibits and the transcript of proceedings in the above case be transmitted to the Circuit Court of Appeals, in connection with the appeal in this case.

Dated this 28th day of July, 1949, at Portland, Oregon.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 28, 1949.

[Title of District Court and Cause.]

DOCKET ENTRIES

Civil 4135

1948

June 21—Filed complaint

June 21—Issued summons—to Marshal

June 25—Filed summons with return of service

Aug. 18—Filed answer

Aug. 23—Entered order setting for pre-trial Sept.
27, 1948—Fee

Sept. 27—Record of pre-trial and order continuing
to Oct. 26 for further pre-trial and trial—
Fee

1948

Oct. 19—Filed praecipe U. S. for subpoena duces tecum

Oct. 19—Filed praecipe U. S. for issuance of subpoenas

Oct. 20—Issued subpoena duces tecum—to Marshal

Oct. 20—Issued subpoenas—to Marshal

Oct. 21—Entered order cancelling pre-trial and trial dates—Fee

Oct. 26—Filed (3) subpoenas

Oct. 26—Filed subpoena duces tecum

1949

Feb. 7—Entered order setting for trial on April 5, 1949—McC.

Mar. 29—Entered order resetting for trial on April 4, 1949, 1:30 p.m.—McC.

Apr. 1—Filed praecipe U. S. for subpoenas—issued 4 subpoenas—to Marshal

Apr. 2—Filed def's motion for subpoena duces tecum

Apr. 2—Filed and entered order for subpoena duces tecum—McC

Apr. 2—Issued subpoena duces tecum—to Marshal

Apr. 4—Filed and entered pre-trial order—McC

Apr. 4—Record of trial before court; order consolidating with Civ. 4133 and 4134 and order that ptff submit brief in 2 weeks; deft 3 weeks thereafter and ptff 1 week thereafter—McC

Apr. 6—Filed subpoena duces tecum with Marshal's return

1949

Apr. 11—Filed exhibits 1 to 4 inc.

Apr. 18—Filed ptff's brief

May 13—Filed deft's brief

May 20—Entered order that ptff prepare and submit Findings, Conclusions and Judgment—McC

May 26—Filed and entered Findings of Fact and Conclusions of Law—McC

May 26—Filed and entered Judgment for ptff for \$4,537.15 with interest at 6% from Oct. 20, 1947—McC

June 1—Filed cost bill of ptff

June 25—Filed notice of appeal to the United States Court of Appeals, by U. S.

July 27—Filed designation of contents of record on appeal

July 27—Filed Statement of points on which defendant intends to rely on appeal

July 28—Filed and entered order to forward exhibits—McC

July 28—Filed Transcript of Proceedings April 4, 1949

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, answer, pre-trial order, findings of fact and conclusions of law, judgment, notice of appeal,

statement of points, designation of contents of record, order to send original exhibits, transcript of docket entries, and clerk's certificate, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4135, J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler, dba Babler Brothers, plaintiffs and appellees, and Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, is defendant and appellant; that the said record has been prepared by me in accordance with the said designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the duplicate transcript of testimony and exhibits 1 to 4 inclusive, which went forward with cause Civil 4133, Babler vs. Earle, were used jointly with this case and Civil 4134, J. N. Conley et al. vs. Earle.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 1st day of August, 1949.

LOWELL MUNDORFF,

Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12319. United States Court of Appeals for the Ninth Circuit. Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Appellant, vs. J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler, doing business as Babler Brothers, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed August 3, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States District Court, District of Oregon
Civil No. 4133

LLOYD BABLER, RICHARD BABLER, JAMES
A. POLLOCK and J. H. SCHESTAK, Doing
Business as Lloyd Babler,

Plaintiffs,

vs.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Defendant.

Civil No. 4134

J. N. CONLEY, M. J. CONLEY and LLOYD
BABLER, Doing Business as Babler and
Conley,

Plaintiffs,

vs.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Defendant.

Civil No. 4135

J. N. CONLEY, M. J. CONLEY, HENRY BAB-
LER and LLOYD BABLER, Doing Business
as Babler Brothers,

Plaintiffs,

vs.

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Defendant.

Portland, Oregon
Monday, April 4, 1949

1:30 o'Clock P.M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. Charles P. Duffy, of Attorneys for Plaintiffs.

Mr. Gene B. Conklin, Assistant United States Attorney, and Mr. Thomas H. Winter, Special Assistant to the United States Attorney, Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS OF TRIAL

Mr. Duffy: The plaintiff is ready, your Honor, or are ready, I should say.

Mr. Winter: The defendant is ready, your Honor. I think it is the same defendant in each case. Is that right?

Mr. Duffy: That is right.

Mr. Winter: I would suggest that inasmuch as these cases involve just a continuing period, with different ownerships, that they be consolidated. I think that was understood before.

Mr. Duffy: Yes.

The Court: Stipulated and so ordered.

Mr. Duffy: If the Court please, we have agreed upon a form of pre-trial order in each of these three cases. We have here for trial today three cases:

Civil No. 4133 in which Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, [2*] doing business as Lloyd Babler, are plaintiffs and Hugh H. Earle as Collector of Internal Revenue for the District of Oregon is defendant; Civil No. 4134 in which J. N. Conley, M. J. Conley and Lloyd Babler, doing business as Babler & Conley, are plaintiffs and in which we have the same defendant; and Civil No. 4135 in which J. N. Conley, M. J. Conley, Henry Babler and Lloyd Babler, doing business as Babler Brothers, are plaintiffs, and we have the same defendant, Hugh H. Earle, Collector of Internal Revenue. These have been consolidated for trial because they involve basically the same question in every suit. The only reason we have three actions here, instead of one, is that the membership in the partnership changed from time to time. Civil No. 4135 involves the period from December 1, 1942, to May 1, 1944; Civil No. 4134 involves the period from May 1, 1944, to April 1, 1945; and Civil No. 4133 involves the last period from April 1, 1945, to December 31, 1945. All of these suits are for refund of transportation taxes.

The Court: What are transportation taxes?

Mr. Duffy: Transportation taxes, your Honor, are imposed under Sections 3475 and 3459 of the Internal Revenue Code. Perhaps I should read the pertinent part of the applicable code sections. Title 26, Section 3475——

* Page numbering appearing at top of page of original Reporter's Transcript.

The Court: Let me know what the statute is. Just tell me what the statute is.

Mr. Duffy: It imposes a 3 per cent tax on the amount paid [3] for transportation. However, that is limited to persons who are engaged in the business of transporting property for hire.

The Court: You mean all of these commercial trucking people pay a transportation tax?

Mr. Duffy: In most instances they do pay it. They collect it from the person shipping the goods. In other words, if you had your own property being shipped down to the beach——

The Court: Household goods?

Mr. Duffy: Household goods—the shipper would collect from you, in addition to the freight, a tax of 3 per cent which he would remit to the Collector.

The Court: Based on what?

Mr. Duffy: Based on the usual rate.

The Court: Then what are these witnesses here for?

Mr. Duffy: The statute says the tax shall apply only to amounts paid to persons engaged in the business of transporting property for hire, and it has been the ruling of the Bureau of Internal Revenue that payments in a situation in which the transportation is being done by employees of the person are not subject to the tax. We have the question whether these particular individuals were employees of the plaintiffs during these times or whether they were independent contractors or employees of independent contractors.

The Court: What is your situation, then, Mr. Winter?

Mr. Winter: It is simply, your Honor, that these owners [4] of trucks were independent contractors; they were hauling gravel for the plaintiff corporation and plaintiff corporation was required to pay a transportation tax on the hauling of gravel. All of these contractors held licenses from the State of Oregon as contractors for hire and they hauled and transported gravel in two instances and dirt in dump trucks, and plaintiff became liable for transportation taxes and now they are suing for a refund. I do not mean the corporations; I mean the individuals doing business as Babler Brothers.

The Court: What is the factual situation, Mr. Duffy? What was the operation?

Mr. Duffy: The plaintiffs are general contractors, your Honor, and during this period of time they were engaged in constructing and re-servicing roads and highways and airports at Redmond and Klamath Falls and Salem.

The Court: Yes.

Mr. Duffy: In order to get the jobs done, they, as we say, employed contractors who in some instances owned their own trucks and drove their own trucks on the job. We contend they were employees of the plaintiffs inasmuch as during this time they were carried under Social Security, employment tax, or unemployment tax, I should say, and everything of that sort. The Government contends they were independent contractors and were persons engaged in transporting property for hire.

The Court: In the usual cases we have had under various [5] Federal statutes the positions of the parties have been reversed.

Mr. Duffy: Yes.

The Court: The Government has claimed they were employees, like in log hauling.

Mr. Winter: Of course, the Supreme Court has definitely decided that question, in our opinion. In this particular instance these contractors hauled gravel for nine, ten or more miles; not hauling on this property.

The Court: Is this the same as log hauling?

Mr. Winter: There are what you call independent log haulers who contract to haul logs, but there are no logs involved here.

The Court: But the question is the same, isn't it?

Mr. Winter: Well, your Honor, primarily, there has been some distinction made, whether or not it is still a continuation of the logging operation, from the woods up to the dump, as to whether or not that is still a part of the logging operation, which would be different from this case. We do not have a situation like that.

The Court: Has this question been tried in other courts?

Mr. Winter: We have never had a case involving hauling in Oregon. There was a case in Georgia involving the construction of an airport.

The Court: Are there any cases the other way, Mr. Duffy? [6]

Mr. Duffy: Both the cases Mr. Winter has in mind in the Supreme Court are in our favor, your Honor.

Mr. Winter: In the Georgia case it was all confined to hauling within the airport, within the area, and there was no general hauling out on the roads and highways. In other words, in that operation it would not have been necessary for them to have had any PUC license. We think the cases are entirely distinguishable. There are no cases on the facts that we have present in these cases.

The Court: All right; call your witnesses.

Mr. Duffy: In addition to this employer and employee question, we also contend that this is not transporting property for hire in the sense it is just a part of the integral operations of the plaintiffs, and that this is not transporting property within the meaning of the statute.

The Court: Put a witness on the stand.

JOSEPH H. SCHESTAK

was thereupon produced as a witness on behalf of Plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Duffy:

Q. You are J. H. Schestak? A. Yes, sir.

Q. You are one of the plaintiffs in case Civil No. 4133 in which Lloyd Babler, Richard Babler, James

(Testimony of Joseph H. Schestak.)

A. Pollock and yourself are plaintiffs, doing business under the name of Lloyd Babler?

A. Yes.

Q. Did you have any connection with partnership before this time?

A. Well, I did have when it was known as Lloyd Babler and since we reorganized we called it Babler Brothers.

Q. When did you first start working for this group which was known by different names at various times?

A. Well, originally Babler Brothers went to work in 1933.

Q. In what capacity have you worked with them?

A. I was timekeeper and bookkeeper.

Q. Starting December 1, 1942, which is the first date involved in these proceedings, what was your position with Babler Brothers?

A. I was the general office bookkeeper.

Q. You were the general office bookkeeper?

A. Yes.

Q. Where was that office?

A. Located in Portland, on Milwaukee Avenue, 4617 Southeast Milwaukee Avenue.

Q. What were your duties as general bookkeeper and office manager?

A. Well, I wrote the checks in payment of all these invoices [8] covering trucking and also kept the accounts.

(Testimony of Joseph H. Schestak.)

Q. What was the nature of Babler Brothers' business at that time?

A. The beginning of 1942 and during 1943 they were constructing the Redmond Air Base.

Q. Did they do any other work during that period of time other than the construction of the Redmond Air Base?

A. During 1943 I don't believe they did. I don't believe there was any other work. There might have been a small job or two, but I just don't recall.

Q. The principal work during that period, December 1, 1942, to May 1, 1944, was the construction of the Redmond Air Base?

A. That is right.

Q. Approximately how many employees did you have there? A. Oh, around 300.

Q. 300? A. Yes.

Q. During the second period, from May 1, 1944, to April 1, 1945, you held the same position as office manager? A. Yes.

Q. What was the principal work done by the partnership during that period?

A. Highway construction.

Q. Where was that highway construction being done? A. In the State of Oregon. [9]

Q. In the State of Oregon?

A. Mostly in the State of Oregon, yes, sir.

Q. For the last period from April 1, 1945, to De-

(Testimony of Joseph H. Schestak.)

cember 31, 1945, you had the same position except you were also a partner at this time?

A. That is right.

Q. What was the nature of the partnership business during this last period?

A. Highway construction, re-servicing and oiling highways.

Q. Were any airports constructed during this period?

A. The Salem Air Base. We built the Salem Air Base. That is in 1942, though.

The Court: I didn't get it. You say in the third period the Salem Air Base was constructed?

A. 1943.

Mr. Winter: That was in the first period.

A. The first period, yes.

Q. (By Mr. Duffy): Would you mind stating just exactly what your duties were as office manager during all of these periods?

A. Well, I had charge of the general books. The field timekeeper, he prepared the invoices covering truck rentals and mailed them to our office and I wrote the checks and the checks were returned to the field office.

Q. The field timekeeper sent in the time and you wrote the checks based upon that? [10]

A. Yes.

Q. You kept central books, did you?

A. Oh, yes.

Q. Who was your timekeeper?

(Testimony of Joseph H. Schestak.)

A. Mr. Shurte.

Q. Mr. Roy Shurte was your timekeeper on the job?

A. Yes.

Q. Did you, at my request, compile, under your supervision, figures showing the names of various truck owners and the time they worked?

A. Yes, I have.

Q. You have been handed Plaintiff's Pre-Trial Exhibit No. 1. I will ask you if that constitutes the figures that you have compiled?

A. Yes, sir; they are.

Q. Showing the names of the truck drivers and the manner in which they were paid and the periods during which they worked?

A. That is correct.

Mr. Duffy: I will offer Plaintiff's Pre-Trial Exhibit 1 in evidence.

Mr. Winter: May I ask the witness one or two questions on this, your Honor?

The Court: Yes.

Q. (By Mr. Winter): Up at the top of that exhibit you have "Truck Rental, January 1, 1943, to May 1, 1944." Where did you [11] take those words "Truck Rental" from? *From record* did you take that?

A. Well, I guess our invoices are marked that way.

Q. Your invoices are marked?

A. The original files.

Q. What? A. The original files.

(Testimony of Joseph H. Schestak.)

Q. You mean the invoices that you give to the truck operators?

A. The one that is attached to our voucher. We attach the original invoice to the voucher when we pay and usually the truck owner gets a copy of it.

Q. Is that the invoice you refer to, Exhibit A, which is attached to the stipulation or pre-trial order?

A. That is right. It is a copy.

Q. Where does that say anything about rental on there?

A. Well, this particular one does not.

Q. That particular one does not? A. No.

Q. Do you have any original invoices with you, here? A. I have a copy.

Q. May I see it? A. I have a copy.

The Court: This will be cross-examination when you get to it.

Mr. Winter: What I am trying to get at is whether or not [12] these records are copies, if this "Truck Rental" is copied from something. I want to know where they have carried "Truck Rental" on the records.

The Court: Mr. Duffy can tell you quicker.

Q. (By Mr. Winter): Why did you carry it as "Truck Rentals"? Is that because you contend it was truck rentals in the issues before this Court?

A. No. I said I could furnish the original voucher.

(Testimony of Joseph H. Schestak.)

Q. Do you have the original voucher with you? That is what I want to know.

A. Yes. They are down at the office.

Q. (By Mr. Duffy): Let me ask you this: This caption you put at the top of Plaintiff's Exhibit No. 1 is just a means of identifying these particular figures? A. That is right.

Q. (By Mr. Winter): Does the exhibit show the name of each individual truck driver who did not own his own truck?

A. Those are truck owners.

Q. Well, the truck owner furnished more than one truck, didn't he? Is that shown on the exhibit? A. I rather think it is.

Q. But it does not have the names of any of the truck owners' drivers who were on the trucks?

A. Well, no, I don't think that sheet has, but the drivers' names are on the original invoices. [13]

Q. The original invoice, Exhibit A?

A. That is right.

Q. This just includes all truck owners who furnished one or more trucks?

A. That is right, yes.

Q. In hauling and in construction?

A. Yes, sir.

Mr. Winter: I think that is all. We have no objection.

(Compilation showing names of truck owners and time worked, etc., thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

(Testimony of Joseph H. Schestak.)

Mr. Winter: Of course, we don't admit the conclusion that they were truck owners.

Q. (By Mr. Duffy): How did you compute the amounts of the checks to be sent to the individual truck owners?

A. Well, it all depended on how they worked. Some worked by the hour. We paid them \$2.00 an hour or \$2.40 an hour. They received that as payment in full. That—Others were deducted the drivers' time, plus the payroll insurance.

Q. You paid the amounts sometimes based on the hours for which the trucks were rented, sometimes on the basis of the amounts hauled and sometimes on the basis of the distances hauled?

A. That is right.

Q. Just how did you compute that? [14]

A. There are various methods of doing it. I just looked up the yard mile haul and computed it on the distances. I think it calls for 9 cents a yard mile.

Q. By "yard mile haul" you mean hauling so many yards so many miles?

A. That is right.

Q. What deductions were made from the amount of the check sent to the truck owner?

A. Well, one per cent for Social Security, three per cent unemployment and whatever rate the State Industrial Accident insurance was. I believe on that particular one it was \$6.00 a hundred less 10 per cent.

(Testimony of Joseph H. Schestak.)

Q. You mean that was the rate of the State Industrial Accident insurance?

A. That is right.

Q. Were the wages of the driver deducted from the amount of the truck rental?

A. Yes, but not in all cases.

Q. In addition to that the amount which you term "payroll insurance" was also deducted?

A. That is right.

Q. Did you remit these amounts to the Collector of Internal Revenue, the amounts which you deducted for unemployment tax and Social Security?

A. Yes, sir. [15]

Q. During all of these times these drivers were carried as your employees, is that correct?

A. That is right.

Q. And you paid Social Security taxes?

A. That is right.

Q. What payments were also made to the State of Oregon?

A. Unemployment insurance and State Industrial Accident, payroll insurance.

Q. When did the Government first assert this transportation tax against the company?

Mr. Winter: That is objected to as irrelevant and immaterial.

The Court: Answer.

Mr. Winter: When Congress passed the Act imposing it, is that what you mean?

Mr. Duffy: No. I think we can agree that the tax was made effective December 1, 1942.

(Testimony of Joseph H. Schestak.)

Mr. Winter: That is when the Act took effect, when Congress imposed the transportation tax.

Mr. Duffy: I am asking the witness when the Government asserted the transportation taxes against this company.

Mr. Winter: What do you mean by "asserted"? You mean the first time we found out they had not been deducting them?

Mr. Duffy: The first time they made an assessment.

Mr. Winter: I cannot see the materiality. What do you [16] expect to prove here? I don't see the materiality of it.

Mr. Duffy: Let me explain, your Honor. I am making the point here that the Government has, for many years, collected Social Security taxes, unemployment taxes and all during this time but never refunded them and now, after all this time, they also assess this transportation tax.

Mr. Winter: What does that have to do with whether or not transportation taxes are legally due and owing here?

The Court: That will be for determination. Go on and answer the question.

A. I believe the date is on there.

Mr. Winter: A further point: Certainly these truck drivers are employees of the owners of the trucks and certainly Social Security tax is due on their wages where they are working for somebody else.

(Testimony of Joseph H. Schestak.)

Q. (By Mr. Duffy): Was Social Security and unemployment deducted from the truck owners who drove their own trucks as well as the other drivers who didn't drive their own trucks? A. Yes.

Q. I will ask you again: When did the Government first assess transportation taxes?

A. I haven't the date here, but it is in my file there. There is a copy of their audit.

Mr. Winter: The pre-trial order shows when it was paid, if the Court please. The taxes were paid on notice and demand. [17]

A. Well, it was paid on October 20, 1947.

Q. (By Mr. Duffy): It was asserted just prior to that time? A. Yes, sir.

Q. The company thereafter paid the taxes?

A. Yes.

Q. And thereafter you filed a claim for refund which was rejected?

A. Yes, that is right.

Mr. Duffy: That is all.

Cross-Examination

By Mr. Winter:

Q. Just referring to Exhibit A attached to the pre-trial order—do you have any of the statements that you gave to all these truck owners when you made settlement with them? A. Yes.

Q. Do you have one with you? A. Yes.

Q. Let us have the original on your own stationery.

A. I have three copies here, one for a fellow by the name of Case.

(Testimony of Joseph H. Schestak.)

Q. What Case is that? Is he in the courtroom?

A. Al M. Case.

Mr. Winter: I don't know him. Will you stand up, Mr. Case?

Q. Are you acquainted with Mr. Case?

A. No. [18]

Q. May I see the statement? A. Yes, sir.

Q. Let's look at the representative statement which is attached as Exhibit A to the stipulation. The contract price with Mr. Greenberg, for instance, was 9 cents a yard mile. A. Yes.

Q. Wasn't that the contract price that you agreed to pay Mr. Greenberg?

A. Well, we didn't have the contact with him.

Q. That was your verbal understanding, though?

A. That is right.

Q. In other words, he was to get 9 cents per yard mile? A. That is right.

Q. And he furnished, according to the statement, two trucks? A. That is right.

Q. And a driver by the name of Webb?

A. That is right.

Q. Webb had been working for him before that time?

A. I don't know enough about his operation.

Q. According to the statement, Mr. Greenberg hauled 4,139½ yard miles of dirt or gravel or rock, whatever it was, and was entitled to \$372.55?

A. That is correct.

Q. Then he hauled 3,868½ yard miles at 9 cents?

(Testimony of Joseph H. Schestak.)

A. That is right. [19]

Q. \$347.99? A. Correct.

Q. A total of \$720.54? A. Yes.

Q. In the settlement you made with Mr. Greenberg you deducted \$103.95 which you designate on there as payroll for Greenberg, owner of the truck?

A. That is right.

Q. That was the union scale or the OPA scale at that time? A. Correct, yes.

Q. Then you deducted \$111.10 for Webb.

A. That is right.

Q. Or a total \$215.05? A. Yes.

Q. Then you deducted 10 per cent payroll insurance. How did you say you made up that payroll insurance?

A. Well, let's see. That covers payroll—

Q. Well, that covers one per cent Social Security? A. That is right.

Q. Then it covers three per cent unemployment?

A. That is right.

Q. What per cent did it cover for bookkeeping?

A. None.

Q. Well, what is the difference? What is the additional—

A. One per cent Social Security, three per cent unemployment, [20] payroll insurance, State Industrial Accident is six per cent minus ten, and 5.4; that is 9.4, and we paid 70 cents under liability insurance covering the trucks. We carried blanket insurance, a blanket policy covering all rented trucks.

(Testimony of Joseph H. Schestak.)

Q. You did not own any trucks. Babler Brothers did not own any trucks of their own?

A. Oh, yes.

Q. At that time?

A. Yes, at various times.

Q. I am talking about in 1943. A. Yes.

Q. How many trucks did you own?

A. I don't remember. I haven't checked into that. I just don't know.

Q. Well, you owned your own trucks?

A. That is right.

Q. But most of the trucks you got elsewhere?

A. Right.

Q. Most of the hauling you contracted for?

A. Yes.

Q. Then, what you designate as 10 per cent payroll insurance, that included Social Security?

A. That is right.

Q. You mailed checks for the unemployment and Social Security to the Federal Government and to the State? [21]

A. That is right.

Q. But you deducted it from the owners of the trucks on their contracts and charged them with it, didn't you?

A. Deducted it from the statement here, yes.

Q. You deducted it from the amount that you agreed to pay them for hauling, didn't you?

A. That is right.

Q. In fact, they paid it out of the amount which

(Testimony of Joseph H. Schestak.)

you had agreed to pay them at so much a mile, didn't they? A. Well, I guess so.

Q. Did you deduct any amount for transportation tax and pay it? A. No.

Q. You did not pay any transportation tax?

A. No, sir.

Q. When did you pay any unemployment or Social Security except by deducting it from the amount you paid the truck owner?

A. All their employees was on the payroll and were covered in their payroll.

Q. For every truck driver you kept a record of the hours that these truck drivers were working? A. That is right.

Q. Did you deduct from the other employees, your own truck drivers, the Social Security and withholding tax—I mean the Social Security and unemployment tax?

A. How do you mean that? [22]

Q. Did you deduct from your own truck drivers, driving your own trucks, Social Security?

A. No.

Q. You don't show that on that statement?

A. You don't furnish them a statement. You just give them a paycheck.

Q. You just gave them the same rate of pay; they would just get wages as drivers?

A. That is right.

Q. They don't get any statement?

A. No.

(Testimony of Joseph H. Schestak.)

Q. When the company furnished the truck owners gasoline and oil or made repairs to the trucks, was that likewise deducted from the amount they were to receive on a yard mile or hourly basis.

A. Yes, I think so.

Q. In other words, they were to receive 9 cents per yard mile less the cost of wages in operating the truck?

A. Yes, and oil.

Q. And gasoline and oil?

A. Yes.

Q. And the taxes applicable, Social Security or unemployment?

A. That is right.

Q. In other words, if I furnished a truck and went to work on that job, you intended to deduct from my pay, to deduct from me [23] Social Security taxes on my wages?

A. You furnish the truck?

Q. Yes.

A. Well, it all depends on what rate of pay we pay you. In the case of Mr. Case, we didn't deduct anything. We just paid him \$2.40 an hour.

Q. \$2.40 an hour?

A. Yes. We paid all Social Security.

Q. You just paid him \$183.60.

A. So much an hour.

Q. With respect to W. R. Campbell, you deducted one per cent for Social Security?

A. Yes.

Q. And you deducted three per cent for State Unemployment Insurance and charged it against him, and State Industrial Insurance, six per cent, less ten per cent. \$68.58.

A. That is right.

(Testimony of Joseph H. Schestak.)

Q. You did not deduct any public liability and property damage insurance?

A. Well, not on that particular one we didn't, no.

Q. I say, you didn't as against Mr. Campbell?

A. That is right.

Q. This was for the period ending 8/5/43. How many trucks did Mr. Campbell have?

A. Oh, I don't know; two or three. [24]

Q. Three, four or five trucks?

A. That is right.

Mr. Winter: I think that is all.

Redirect Examination

By Mr. Duffy:

Q. As I understand your testimony, then, the manner of paying the men was not uniform?

A. That is correct.

Q. How did they arrive at that particular rate for individual owners?

A. It all depends on where he worked. Case worked on the Salem Air Base and naturally——

Mr. Winter: We are going to object to any attempt to vary the terms of this written instrument. I think we should have the books and records if there is going to be any attempt to vary the terms of our stipulation. If there is some difference than what they have done on Greenberg, we want to know.

Q. (By Mr. Duffy): Were your books inves-

(Testimony of Joseph H. Schestak.)

tigated very thoroughly by Mr. Meuller who is sitting over here, the Deputy Collector?

A. Mr. Meuller was over there, yes. He checked some of them.

Q. He was advised as to the whole matter of paying these drivers?

A. I think so. I think we discussed that.

Q. Mr. Meuller assures me he is an agent; he is not a Deputy Collector. He was advised how you carried the employees on the payroll? [25]

A. Yes, sir.

Q. Those that were working on jobs, in driving trucks? A. Correct.

Q. The owners driving trucks were carried—you carried them uniformly on the payroll?

A. Yes.

Q. I understood the usual practice was for drivers who had more than one truck to bring somebody else along. You were not on the job at all, yourself, though?

A. I wasn't on the job, no. I was in the Portland office.

Q. I understand some of the men were paid at the rate of \$2.00 an hour?

A. I think so, yes.

Q. But 10 per cent was deducted from that?

A. Not on the hourly basis; I don't think so.

Q. 10 per cent of the wages, deducted as payroll insurance?

(Testimony of Joseph H. Schestak.)

A. I just don't remember that. It is quite a number of years ago.

Mr. Winter: Let us have the records here if we going to get at these things.

Q. (By Mr. Duffy): This method of paying the truck drivers and truck owners so much for their trucks less a percentage is just the same as paying the net rental anyway.

Mr. Winter: Object to that.

(Question read.) [26]

The Court: Answer.

A. Yes, sir.

Mr. Duffy: That is all.

Recross-Examination

By Mr. Winter:

Q. What do you mean, just the same?

A. Well, these rates cover truck owners. They are figured by the superintendent in charge and, naturally, he pays which is most advantageous to the job, to the company, so therefore the rate would be the same. We could pay this fellow and not deduct his wages and pay him 8 cents a yard mile.

Q. That was not the agreement?

A. Well——

Q. Your agreement was 8 cents if he brought his truck and furnished the driver?

A. 9 cents.

Q. Wasn't your agreement you were going to pay him 9 and furnish the driver? 9 cents a yard?

(Testimony of Joseph H. Schestak.)

A. If he did not have a driver, we furnished the driver.

Q. If he furnished the driver, then you paid him 9? A. That is right.

Q. Then you would deduct from the amount of the check the amount that you would give to the driver? A. That is right.

Q. You carried the driver's name on your payroll? [27] A. Correct.

Q. But you charged all Social Security taxes to the owner of the truck and all other expenses to the owner of the truck, didn't you?

A. Yes, sir.

Q. Including the wages?

A. That is right.

Q. Then all you did was to keep books for the truck owners, as far as the employee was concerned, isn't that right?

A. Well, this particular one, yes.

Q. That was the usual custom of contractors when they would make contracts with truck owners, wasn't it?

A. No, I wouldn't say that.

Q. You would not say that? A. No.

Q. You don't know that is the common practice?

A. No, I don't.

Q. At least that is the way Babler Brothers handled it?

A. That is the way we handle it, yes.

Q. Everything was classed either on an hourly

(Testimony of Joseph H. Schestak.)

basis or a per-mile basis or on a combination of the two? A. Yes.

Q. Some of these hauls were long hauls, were they not, where they were hauling gravel from quarries?

A. Well, of course, I wasn't on the job. I don't know just [28] how long.

Q. From your knowledge of the statements that you prepared, in other words, they were from one and a half to, say, nine or ten miles? A. Yes.

Q. Hauling gravel to the job, or crushed rock or whatever the material was they wanted to be hauled? A. That is right.

Q. Babler did not have enough trucks or equipment of his own to do this work and complete the contract? A. That is right.

Q. Did you have lots of gravel hauled by rail?

A. No, none.

Q. You usually used trucks for the hauling of it?

A. Yes. Rock usually is furnished in stock piles by the state. All we did is considered on the highway.

Q. You would haul it from the stock pile to the job? A. Yes, sir.

Q. I think you testified as to what jobs—I think you are probably more familiar with the jobs that were being done. You said generally you only had the airport in 1943, is that right, the Redmond Airport? A. I think so.

(Testimony of Joseph H. Schestak.)

Q. What? A. I think so. [29]

Q. To refresh your memory, for the period November, 1942, through 1944, you had the Redmond Airport? A. Yes.

Q. That was a construction job of an Army Air Base, wasn't it? A. That is right.

Q. There were a lot of cinders to be hauled to the job? A. Yes.

Q. Those were hauled some five or six miles?

A. Something like that, yes.

Q. Most of that hauling was done on a load basis of \$2.00 or \$2.15 a load, if you recall?

A. That is right.

Q. Then you also had the air base at Salem?

A. Yes.

Q. That was during that period of time?

A. That is right.

Q. The hauling of rock, was it? You had rock hauled by the truck owners? A. Yes.

Q. From the quarry to the job site?

A. Yes.

Q. So much an hour or so much a mile yard?

A. We paid those fellows by the hour, so much an hour, \$2.40 an hour.

Q. For hauling that? [30]

A. No deductions.

Q. That was for truck and driver?

A. That is right.

Q. You also had one job for Eldon. That was a small job?

(Testimony of Joseph H. Schestak.)

A. That is right, a real small job; a subcontract.

Q. That was from stock piles on the State highway?
A. Yes.

Q. The Ochoco-Veazie Creek job, that was a small job?
A. Yes.

Q. I think you told the investigating officer you didn't remember what was hauled or where to or where from?

A. At that time that Mr. Meuller was there I told him I just didn't remember.

Q. Then you also had the rifle range job?

A. Yes.

Q. That was hauling rock?

A. That is right.

Q. From stock piles?
A. Yes.

Q. Then you worked at Klamath Falls, Oregon?

A. Oh, yes.

Q. That was performed under a subcontract with Morrison-Knudsen?
A. Correct.

Q. Then you had these truck owners haul on that job?
A. Yes. [31]

Q. That job went over into the next period?

A. I think so. I think it went over into the next period.

Q. Then you had the Garibaldi job in the next period, a State highway job. That was hauling rock and other roadbuilding material from stock piles to the job?
A. Stock piles, yes.

Q. Then you had the City of Newport, Oregon, job?
A. That is right.

(Testimony of Joseph H. Schestak.)

Q. That was resurfacing a street?

A. Yes, sir.

Q. And the rock was hauled from a quarry and made available by the city? A. Yes, sir.

Q. Then in the last period you had a resurfacing job for the Highway Department of the State of Washington?

A. Yes, the State of Washington.

Q. That was rock and roadbuilding material hauled from stock piles to the job site?

A. Yes, sir.

Q. You also had a job at Clatskanie?

A. Yes.

Q. That was trucking rock from stock piles to the job site? A. Yes.

Q. Ten you had the Toppenish, Washington, city street job? A. City street. [32]

Q. Toppenish, Washington? A. Yes.

Q. That was hauling crushed rock from a quarry or stock pile to the job? A. That is right.

Q. Then the last one was Crater Lake. Was that a large job? That was a major job, wasn't it?

A. That was a good-sized job; yes, sir.

Q. A lot of hauling on that job, wasn't there?

A. Quite a bit, yes.

Q. That was resurfacing a State highway. How long a highway was it you were resurfacing, do you remember? A. I don't remember.

Q. You were hauling crushed rock from the stock pile to the job site? A. Right.

(Testimony of Joseph H. Schestak.)

Q. Substantially, those are the jobs, the construction jobs, which your company was engaged in during those years? A. Yes.

Q. As I understand, it was necessary to haul all this road-building material to the job site?

A. Yes.

Q. From stock piles or quarries? A. Yes.

Q. For that purpose you contracted or made verbal agreements [33] with these owners to come there and furnish a truck and driver at so much per load basis or mile basis or a combination of both? A. Yes.

Mr. Winter: I think that is all.

(Witness excused.)

Mr. Duffy: I would like to offer in evidence, if the Court please, photostatic copies of claims filed by these various plaintiffs for refunds of the transportation taxes. Mr. Winter has prepared these photostatic copies and I assume there is no objection.

Mr. Winter: Objected to on the ground of being incompetent, irrelevant and immaterial. I call attention to Page 3 of the stipulation where it is admitted claims for refunds were filed and that they were denied. The contentions of the parties with respect to the claims are set forth, and these add nothing to this case whatever.

The Court: They are admitted.

(Photostatic copies of claims for refunds, filed with the Collector, were thereupon re-

ceived in evidence and marked Plaintiff's Exhibits 2, 3 and 4, respectively.)

The Court: Proceed. [34]

PERRY O. DeLAT

was thereupon produced as a witness on behalf of Defendant, out of order, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winter:

Q. Would you state your name?

A. Perry O. DeLat.

Q. What is your business or occupation?

A. Supervisor of motor permits for the Public Utilities Commission of Oregon.

Q. You were subpoenaed to be here and bring with you the records of the State of Oregon covering permits issued to truck owners holding motor transportation permits? A. Yes, sir.

Q. I will ask you what your records show with respect to the permits which had been issued during any part of this period to E. W. Albano.

Mr. Duffy: I object to the testimony regarding what these drivers might have stated in making applications for permits with the Public Utilities Commissioner on the ground that they are hearsay, and these drivers are here in court and can testify as to their status.

The Court: Admitted, subject to the objection. Can't you stipulate on all of this?

(Testimony of Perry O. DeLat.)

Mr. Winter: If Counsel will stipulate, yes. We are prepared [35] to show that these truck owners working for the plaintiffs, hauling for these plaintiffs in these cases, have made application and have been granted motor vehicle permits, licensed as carriers for hire.

Mr. Duffy: I have never examined the records. If Counsel states that is what the record shows, I will stipulate that they have made application.

The Court: And, if Mr. DeLat were examined, he would so testify from the official records?

Mr. Duffy: I understand he would testify these various truck drivers applied for and received PUC permits.

Q. (By Mr. Winter): What license would they have?

A. They would have, prior to January 1, 1948, carrier permits provided by law that authorized carrier operation, including the transportation of logs, poles, piling, lumber, wood, the operation of dump trucks in connection with highway or building construction, and the operation of trucks of any description in transporting ores or concentrates from mines, pits or quarries, either for hire or for themselves.

Q. If the trucks in question were leased or rented to the plaintiff corporation, would it be necessary for them to have a license with your department similar to the licenses issued to the truck owners?

(Testimony of Perry O. DeLat.)

A. A permit can only be issued to the actual operator of the motor vehicle. If they are under lease, then the lessee is [36] required to hold the permits.

Q. Did the plaintiff during any of this period have such a permit with the State of Oregon?

A. They have had permits—I don't know. I couldn't state the exact status. They have held permits, yes, and may at the present time.

Q. In connection with these trucks?

A. No.

Q. Covering trucks which they own, is that right?

A. That they own or lease—that they operate.

The Court: The emphasis is on operating rather than ownership?

A. That is right.

Mr. Winter: I didn't hear the Court's question.

The Court: The emphasis is on operation rather than ownership?

A. That is right. If they are not owned, they file a lease; the lessee files a lease and then he becomes the operator and holds the permit under Oregon law.

Q. (By Mr. Winter): All of the trucks owned by these individuals were registered or licensed in their names, and not in the plaintiff's?

A. That is right.

Q. The plaintiff, on any truck that is owned or operated, was required to take out a permit? [37]

A. That is right.

(Testimony of Perry O. DeLat.)

Q. Was it the same license as was issued to these individuals?

A. It could be, or it could be a private carrier's license which authorized transportation of their own property whether by dump truck or otherwise.

Mr. Winter: You do not contend plaintiffs took out any licenses on these trucks owned by these individuals, do you, Mr. Duffy?

Q. Is it necessary to furnish evidence of insurance, public liability? A. Yes, sir.

Q. Did all of these drivers or truck owners carry such insurance?

A. They did, as long as their license was in effect.

Q. And they furnished such information to your department? A. It is on file; yes, sir.

Mr. Winter: I think that is all.

Cross-Examination

By Mr. Duffy:

Q. What is the amount of that insurance they are required to carry under this particular plate?

A. Transportation of property requires \$5,000-\$10,000 property damage limits and—public liability limits, and \$5,000 property damage.

Q. Is the arrangement the same as with others in this area, such as logging operations? [38]

A. The same form and same practice, yes.

Q. In other words, log haulers, hauling at so much a thousand for somebody, are required to have these same plates?

(Testimony of Perry O. DeLat.)

A. That is right.

Mr. Duffy: That is all.

(Witness excused.) [39]

J. N. CONLEY

was thereupon produced as a witness on behalf of Plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Duffy:

Q. You are J. N. Conley? A. Yes.

Q. You are one of the plaintiffs in Causes No. 4133, 4134 and 4135? A. Yes.

Q. In the first case, doing business as Babler and Conley and, in the second case, doing business as Babler Brothers? A. Yes, sir.

Q. You are no longer connected with the company? A. No.

Q. You are not? A. No.

Q. What were your duties during this period from December 1, 1942, to April 1, 1945?

A. Well, I was a partner and owner and superintendent.

Q. You were superintendent; that is, out on the job? A. Yes.

Q. On what jobs were you superintendent? Just state generally.

A. Well, at the Redmond Air Base and others, mostly in Central Oregon. [40]

(Testimony of J. N. Conley.)

Q. When you say you were general superintendent, that means you were the one in charge of the whole operation? A. Yes.

Q. Would you tell the Court the manner in which these truck owners and drivers were brought onto the job?

A. Well, generally they would come to the job seeking work and declaring that they had trucks for rent, and they would put their names on a list and at such time as we needed trucks we would contact them and hire them.

Q. What type of trucks were used on these projects? A. Mostly dump trucks.

Q. What materials were being hauled?

A. Well, there was gravel and cinders and powder and explosives of all kinds and——

Q. Mostly bulk construction material?

A. Yes.

Q. Supposing you had a truck owner who owned more than one truck, how would the drivers for the other trucks be employed?

A. Well, frequently during the war the owners would come short of drivers and frequently they did not have anyone in mind to transport the trucks to the job, so we would help them to choose from our crew and send men out to drive their trucks.

Q. Did you have a union contract at that time?

A. Yes.

Q. Did you employ all men through the union?

A. Yes, as long as they could supply them. We

(Testimony of J. N. Conley.)

also maintained a list of drivers at our job office and when and if we needed them we would call them.

Q. This list has been developed from men who had applied to you for work?

A. That is correct.

Q. What are your exact duties, Mr. Conley, or what were they? Did you have any immediate supervision or methods to be employed there?

A. Yes.

Q. Supposing the drivers, either owners or others, should prove unsatisfactory. Do you have the right to fire them?

A. Oh, yes, and we frequently did.

Q. Did you supervise the method in which they did the work? A. Yes.

Q. Just what type work was it? Just state briefly the nature of the hauling.

A. Well, the majority was dump truck work, transporting dirt, rock, cinders and anything required in the construction of the air base.

Q. Did they haul from a shovel or from a quarry?

A. Well, from bunkers and shovels; bunkers and shovels.

Q. Where did they take the materials?

A. To the Air Base. Frequently we had rock excavations, local excavations. They would work under shovels, and haul from the [42] shovel to the fill.

(Testimony of J. N. Conley.)

Q. Some of these trucks were working right on the Air Base? A. Yes.

Q. They were all maintained and employed in the same way?

Mr. Winter: That is leading.

A. Yes.

Q. (By Mr. Duffy): Were the trucks required to report for work at the same time as the other employees? A. Yes.

Q. Did the truckers haul for you exclusively during these periods of time?

Mr. Winter: If he knows.

A. I don't understand.

Q. (By Mr. Duffy): If you know, during this period of time they were working for you did they have to work for you alone or could they haul for other people and keep their job with you?

A. No; they were expected to be on the job if they were in our employ.

Q. In controlling the trucks did you have someone in immediate supervision at the shovel or at the bunker? A. Yes.

Q. To tell them where to spot their trucks?

A. Yes.

Q. What other directions were given to the truck drivers by [43] either you or other representatives of the company as to the method in which they should perform the job?

A. Well, they were told to be at a certain place at a certain time in the morning, and they were

(Testimony of J. N. Conley.)

directed to which shovel to be loaded at. Of course, they were directed which roads to take as they came on the Air Base. They were directed to the dump and the time of their arrival was recorded.

Q. Who kept the time?

A. Roy Shurte.

Q. If one of the trucks broke down, would the company render any assistance?

A. Well, generally the basis of hiring the truck would determine whether or not they did. If there was anything in the way of emergency assistance required, it would be rendered them. Your trucks are generally rented on a basis of bare or with drivers, or any way to form some basis of arriving at the pay, and we used several methods.

Q. Were drivers who were the owners of trucks paid overtime if they worked more than eight hours a day, more than forty hours a week, I should say?

A. Yes.

Q. They were paid overtime? A. Yes.

Q. How many hours a week did they work?

A. Well, they worked ten hours a day and seven days, although [44] at various times they worked different shifts.

Q. In the event that any driver, whether he was the owner or a non-owner, performed his work unsatisfactorily in any way, did you have the right to tell him "You are through"? A. Yes.

Mr. Duffy: That is all.

(Testimony of J. N. Conley.)

Cross-Examination

By. Mr. Winter:

Q. When you fired a truck owner, did you have the right to keep his truck, or did you hire him and the truck both?

A. That is generally the way.

Q. Did you have the right to keep his truck?

A. Well——

Q. If you fired him?

A. I felt that we did, yes.

Q. You had the right to keep his truck?

A. Well, yes, I thought that we had.

Q. Did you ever fire anybody and keep his truck?

A. Well, I fired several owner that left their trucks there.

Q. They did leave their trucks, but they could have taken them away if they had wanted to?

A. That question was never brought up.

Q. Lots of truck owners fired their own drivers, didn't they?

A. Well, they expressed dissatisfaction.

Q. I say, they did, didn't they? [45]

A. I don't remember that they did.

Q. You don't remember any truck owner ever firing one of the drivers that he brought there?

A. Well, as I say, they expressed dissatisfaction and I think probably we just paid them off. After all, we needed the trucks.

Q. Well, he had an agreement to drive a truck at so much per yard mile, didn't he? A. No.

(Testimony of J. N. Conley.)

Q. Or so much per hour? A. Yes.

Q. Didn't you have any agreement on the job at so much per yard mile? A. No, sir.

Q. The owners were all on an hourly basis?

A. No, there was some by the trip.

Q. By the trip? A. Yes.

Q. How long a trip was that?

A. Well, roughly, five miles, variably.

Q. What? A. Variably.

Q. Yes.

A. There were several hauls, some of them four and a half to six miles.

Q. Four and a half to six miles? [46]

A. Yes.

Q. The price per trip depended upon the length of the trip? A. That is right.

Q. If it was a short trip, of course you paid less per trip than if it was a long trip?

A. That is correct.

Q. A good many of the truck owners had more than one truck? A. Yes.

Q. They had been hauling on other jobs before they came to work for you?

A. I believe they had.

Q. They all had licenses as common carries, didn't they, or for hire? A. Not all.

Q. Did any of them operate under your license?

A. Well, only these trucks that went out on the highway were required to have Public Utilities permits.

(Testimony of J. N. Conley.)

Q. All of the trucks which you contracted for with the truck owner had licenses, didn't they?

A. No.

Q. What? A. No.

Q. Name one that did not. A. Adams.

Q. Who? [47]

A. A fellow by the name of Adams.

Q. How many trucks did he have?

A. I believe he had one.

Q. Where did he work?

A. He worked on the Air Base.

Q. Did he leave the Air Base? A. No.

Q. Were there any trucks that worked for you, outside of Mr. Adams, that did not have a license?

A. That is pretty difficult to say.

Q. You should be able to name more than one, shouldn't you? A. No.

Q. Name one more.

A. Myself. I had one.

Q. You had one truck? A. Yes.

Q. Did you work for the company as an employee or were you a partner?

A. I just put my truck to work and allowed myself rent.

Q. You allowed yourself rent? A. Yes.

Q. That was not part of the partnership assets?

A. No. They were part of the J. N. and M. J. Conley equipment.

Q. When it was necessary to get drivers, you contacted the union and saw if they had any drivers?

(Testimony of J. N. Conley.)

A. My usual method was to report it to my job office, and then they started in with the union and hunted until they found a driver.

Q. I think you said in case one of these truck owners——

A. Pardon.

Q. If they had an emergency or any truck was in the way and you had to get busy you helped out with company equipment, is that right?

A. Yes.

Q. In case there was no emergency, and a truck wasn't in the way, and you had plenty of trucks, you did not bother with it then?

A. Well, it would depend on how the man was working, how the equipment was hired.

Q. If it was hired at so much an hour, so you were not paying anything out, you did not have to go out and fix it?

A. Some are at so much an hour, less reasonable wear and tear, and some are at so much an hour including reasonable wear and tear; others were hired at so much an hour, including everything, fully operating.

Q. "Fully operating," that means furnishing a driver?

A. That means furnishing a driver's wages, yes.

Q. And furnishing the driver, too. How many of these owners furnished their own drivers? Many of them furnished their own drivers, didn't they?

A. That is correct.

Q. Drivers who had been with them for years?

(Testimony of J. N. Conley.)

A. I wouldn't know that. I imagine they could have been.

Q. Some of these truck owners had lots of trucks and they were going from contract to contract? A. Yes.

Q. They would bring all of their equipment?

A. Yes.

Q. All of their trucks and drivers, who stayed with them during this job—A good many of them did, didn't they? A. Yes.

Q. You say it was very difficult to get men to drive trucks at that time. The truck owners were having just as much difficulty in getting men as you were, weren't they? A. Yes.

Q. Other contractors were having a great deal of difficulty in getting men?

A. I believe so.

Q. It was to your advantage to get men to drive these trucks that these truck owners furnished?

A. No, the purpose in hiring a truck if we had no driver——

Q. You did all you could to see that a driver was available, then? A. That is right.

Q. It did not make any difference whether you went out and [50] secured them or whether the truck owner went out and secured them, as long as they were secured?

A. A man that was secured had to be capable of driving a truck and have a driver's license.

Q. A truck owner had the right to say what

(Testimony of J. N. Conley.)

driver drove his truck. If he was not satisfied, he could say to take him off of it, couldn't he?

A. They did not complain.

Q. And they did do that, didn't they?

A. Well, they did not complain——

Q. What?

A. Not without my approval, they didn't.

Q. But you have never left a driver on an owner's truck when he did not want the driver, have you?

A. I don't recall if that case arose.

Q. In other words, whenever the owner of a truck did not want a driver, and he complained to you about it, he was removed, wasn't he?

A. Not always.

Q. Well, he was in most cases; let us put it that way.

A. Well, I don't remember a single case where—the thing was generally settled before it got to me.

Q. Always settled before it got to you?

A. In a case like that they frequently got in quarrels and had trouble on the road and the driver would walk off and leave the [51] truck and the owner would come and say, "Do you have a driver?"

Q. You were all the time looking for drivers for these trucks to see that the equipment moved, weren't you?

A. Well, we had about fifteen trucks, I believe, of our own.

Q. About fifteen trucks of your own?

(Testimony of J. N. Conley.)

A. Yes.

Q. Those were licensed with the state, weren't they? A. Most of them.

Q. All those that went off your own particular property were licensed with the state as private carriers?

A. Those that went out onto the public highway, yes.

Q. And you paid insurance on those trucks?

A. Yes.

Q. None of the owners or drivers could suggest that you fire any of your own men, could they?

A. I beg your pardon.

Q. None of these truck owners or drivers could suggest that you fire any of your own truck drivers?

A. They would have no point in doing that.

Q. They did not even try to, did they?

A. Actually, they did, yes. Some drivers you hire would be not very good, not good suitable people, not good drivers, liable to have accidents, and for the common good it would be suggested that they be removed, whether from our truck or that man's truck or whoever it was. [52]

Q. They wanted to protect their own skins, didn't they? A. Well, probably.

Mr. Winter: That is all.

Redirect Examination

By Mr. Duffy:

Q. Were these owners paid on the payroll?

A. Yes.

(Testimony of J. N. Conley.)

Q. They were paid the same time as the others?

Mr. Winter: We think the records are the best evidence of how or what they were paid. He is not the bookkeeper. He does not know what they were paid.

Q. (By Mr. Duffy): I am asking if you know whether the truck owners were paid at the same time and in the same manner as the other employees on the job?

A. I signed every check on the job.

Mr. Duffy: That is all.

Recross-Examination

By Mr. Winter:

Q. You signed two checks, the same as Exhibit No. 1 shows? A. No, just the payroll.

Q. How would they get the balance of what they had coming on an hourly basis for their trucks?

A. The general office.

Q. What? A. From the general office.

Mr. Winter: That is all.

Redirect Examination

By Mr. Duffy:

Q. They were paid on the job for their labor and were paid from the Portland office for rentals?

A. Correct.

Mr. Duffy: That is all.

(Witness excused.) [54]

LLOYD BABLER

was thereupon produced as a witness on behalf of Plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Duffy:

Q. You are a plaintiff in all three of these suits, covering these three periods? A. Yes, sir.

Q. You were a partner in the company at all times? A. Yes.

Q. What was your position in the company, your duties?

A. Bidding on the work and discussing our policies with Mr. Conley. I was on the job a part of the time and some of the jobs I supervised myself.

Q. Your job was supervising some of these projects? A. Yes.

Q. Which of these jobs required your supervision?

A. Well, the Salem Air Base was one of them, and I think there was one down on the Coast, and I spent some time on the Air Base at Redmond.

Q. You have heard the testimony of Mr. Conley. Will you state whether or not the method of operation on the jobs which you supervised was basically the same as that as to which Mr. Conley has testified? A. Well, they were very similar, yes.

Mr. Duffy: That is all.

Mr. Winter: No questions.

(Witness excused.)

ROY SHURTE

was thereupon produced as a witness on behalf of Plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Duffy:

Q. Your name is Roy Shurte. Am I pronouncing that correctly?

A. Yes, sir; that is right.

Q. What was your job during the period from December 1, 1942, to December 31, 1945?

A. I was field timekeeper for Babler Brothers and J. N. Conley and M. J. Conley.

Q. Field timekeeper?

A. That is right, in the field office.

Q. On all of these projects?

A. Not all of them, no. I was at the Redmond Air Base and Klamath Falls.

Q. Would you say you were on the larger projects?

A. The larger projects quite a ways from Portland, yes.

Q. Just what were your duties as timekeeper?

A. Keeping time, making the payroll and time records before they were sent to Portland. [56]

Q. How did you make up these time records?

Mr. Winter: We do not deny that they kept the time of these trucks or that they kept these records.

Q. (By Mr. Duffy): How were the men paid, Mr. Shurte?

(Testimony of Roy Shurte.)

Mr. Winter: We think the books are the best records, the best evidence as to how they were paid. The statement shows how they were paid, the representative statement.

Q. (By Mr. Duffy): Let me ask you this, Mr. Shurte: In paying the wages of the truck owners—

Mr. Winter: We object to using the word “wages.” That is one of the issues to be determined, whether or not it is compensation for services or whether or not it is a payment under a contract for hauling. That is one of the issues here.

Q. (By Mr. Duffy): In connection with the payment of compensation for the services of these men who were driving trucks, were Social Security deductions, unemployment deductions and other deductions made as withholding payments, made from their compensation? A. That is right.

Q. How were men selected to drive these trucks?

A. I usually had quite a list, had a regular card file in the office, and they would come in and want a driver and I would call one of them.

Q. How did you compile that?

A. As they would come and apply to me, or maybe the union [57] representative would come down from Bend and leave a list of names that he would have available.

Q. Would you give us a typical example of your manner of operation? Suppose the information was conveyed to you that there was a truck without a driver——

(Testimony of Roy Shurte.)

A. The first thing I would do would be to contact the superintendent if possible; if not, I would usually find a driver and send him right out to the truck.

Q. Where would you find this driver?

A. From that list that I had compiled.

Q. Did you have to clear them through the union?

A. Not necessarily; in some instances we did, when they had a representative right there, close by, but their office was in Bend. Of course, lots of our drivers came from Bend. That was about sixteen miles away.

Q. Was the union able to furnish enough drivers? A. Not at all times, no.

Q. They permitted you then to hire other men when their lists were exhausted?

A. That is right.

Q. Did you have anything to do with hiring or firing these men? A. Not personally, no.

Q. When were the men required to report for work in the morning?

A. There were some jobs that started at 6:00 o'clock, some that [58] started at 7:00 and some that started at 8:00. It depends on where we were working. At one time we was working around the clock.

Q. Were truck drivers required to report for work the same as all the other employees?

A. That is right.

(Testimony of Roy Shurte.)

Q. What was the method you followed in terminating your relationship with these truck drivers?

A. Well, how do you mean?

Q. Suppose a superintendent on the job dismissed a truck driver for any reason; what was your bookkeeping practice?

A. I would make out his payroll check at the time.

Q. Your duty, then, consisted of compiling the payrolls and paying the men?

A. That is right.

Q. The truck rentals were not paid by you, is that correct?

A. I compiled the truck rental all right on these check sheets; I would always double-check the sheets that came in from both ends of the job.

Q. Where did you send those sheets?

A. Most of these sheets were filed in the Portland office. I reduced it down to a form and then mailed the form to Portland.

Q. And Portland would send to the truck owner the amount of the truck rental?

A. That is right, less deductions. [59]

Mr. Duffy: That is all.

Cross-Examination

By Mr. Winter:

Q. When you say "truck rental," the Portland office would send them the balance of the amount due, which was agreed upon, whether the contract

(Testimony of Roy Shurte.)

was on a yard-mile basis or on an hourly basis, is that right?

A. Would send them the balance that was due after deductions.

Q. After they deducted Social Security taxes of drivers of trucks? A. That is right.

Q. The same as Exhibit A attached to the stipulation, is that right?

A. I don't know anything about Exhibit A. The deal was we would rent trucks.

Q. I beg your pardon?

A. We would rent trucks—would go out and get trucks from anybody we could.

Q. When a truck owner did not have a driver for his truck, would he come to you for a driver?

A. Oftentimes, yes.

Q. Then you would get a driver for the truck owner? A. Yes.

Q. For his truck? A. Yes. [60]

Q. They always accepted those driver that you got?

A. I don't know of any instance where they turned them down. I knew most of the drivers around the country, who they had driven for and so on.

Q. You knew most of them? A. I did.

Q. What did you tell them, that John Jones, truck owner, needed a truck driver?

A. Either that or John Jones would be waiting for a driver and I would turn him right over to him.

(Testimony of Roy Shurte.)

Q. Then the owner of the truck would talk to him?

A. Not necessarily. I would show him the truck and turn him loose.

Q. The owner would just show him the truck and turn him loose? Did any owners come and complain to you about drivers that were not satisfactory?

A. I don't know that they did.

Q. What?

A. I don't know.

Q. Was there ever any wreck or anything?

A. Yes, there were wrecks.

Q. And some truck drivers would be fired?

A. I don't know that that had anything to do with it.

Q. The owners always reserved the right to say who was going to drive a truck, if they wanted to?

A. Well, I imagine they would, as long as they owned the truck.

Q. They could take a truck off the job any time they wanted to?

A. I don't know as they did.

Q. They could have?

A. I didn't authorize such things myself.

Q. Some of them came and worked a day or two and then left there?

A. That happens on all jobs.

Q. They came and stayed as long as they wanted to and then they left?

A. No, not necessarily.

Q. Some of them only worked a day or two and then left?

A. True.

(Testimony of Roy Shurte.)

Q. Some worked longer terms?

A. Maybe we didn't need them any longer than a day or two.

Q. Either they did not want to stay or you did not want them, either one or the other.

A. Well, there was usually a little dissatisfaction someplace.

Q. So they pulled off the truck and left, is that right? A. I guess it is.

Q. And they would take the drivers with them, if they wanted to?

A. That did not always happen. [62]

Mr. Winter: That did not always happen, but it did happen. That is all.

Redirect Examination

By Mr. Duffy:

Q. You could put one of these drivers on a truck without consulting the owner?

A. We did, yes.

Recross-Examination

By Mr. Winter:

Q. When did you put a driver on a truck without consulting the owner? Was he away?

A. He might have been 500 miles away. We had his trucks. We had them hired.

Q. You did not consult him then?

A. No, there was no way we could.

Q. You had authority to do it, to put a driver on his truck?

A. We had authority to do that.

(Testimony of Roy Shurte.)

Q. That was your agreement with him?

A. That was our agreement.

Q. But if he came back and found a driver that was not satisfactory, he always had the right to come in and take him off?

A. He could come in and make a suggestion, yes.

Mr. Winter: And take him off. That is all.

(Witness excused.)

(Recess.)

Plaintiffs Rest. [63]

Defendants' Testimony

L. M. CASE

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winter:

Q. Your name is L. M. Case?

A. Yes.

Q. Where do you reside?

A. At No. 216 North 23 Street, Salem, Oregon.

Q. What is your business or occupation?

A. I am a truck operator.

Q. By truck operator do you mean you hold a license as a carrier for hire? A. Yes.

Q. How long have you been operating as a carrier for hire? A. Since 1921.

(Testimony of L. M. Case.)

Q. Since 1921? A. Yes.

Q. Have you ever entered into any agreement to operate your trucks for the plaintiffs in this action, these suits, during any part of the period involved?

A. Yes, I worked for them.

Q. When was that?

A. I think it was in 1943. [64]

Q. On what job was that?

A. The Salem Airport.

Q. On the Salem Airport? Were you hired as a truck driver or were you hired with your truck?

A. I was hired with my truck.

Q. In other words, I take it you were hired as a unit? A. Yes.

Q. Did you understand you could be fired and that they could have kept your truck?

A. No, I didn't understand that.

Q. What was your agreement? Just state it to the Court.

A. I went to work for them for so much an hour for myself and truck, as a unit.

Q. As a unit? A. Yes.

Q. Were you at liberty to leave at any time?

A. Yes, I felt I was.

Q. Was it your understanding you could have been fired and another driver could have been put on your truck? A. Pardon?

Q. Did you understand you could have been fired and another driver could have been put on your truck?

(Testimony of Jack Becker.)

(Testimony of L. M. Case.)

A. No, wasn't no agreement to that effect.

Q. Have you entered into agreements as a carrier for hire with other companies during the past years? [65]

A. Yes.

Q. I take it now you have some agreement with the County?

A. Just an oral agreement.

Q. For you and your truck as a unit?

A. Yes.

Mr. Winter: I think that is all.

Cross-Examination

By Mr. Duffy:

Q. Mr. Case, were you required to belong to the union when you worked for the plaintiffs?

Mr. Winter: We will object to that.

A. I don't remember whether I belonged to the union at that time or not. I have belonged to the union.

Q. (By Mr. Duffy): Do you have a Social Security number?

A. Yes.

Q. On these jobs with the plaintiffs were amounts deducted from your compensation as Social Security?

A. Yes. They deducted that.

Q. Could the plaintiffs at any time fire you off the job if they did not like the way you were driving the truck?

A. Well, I imagine they could fire me and the truck.

(Testimony of L. M. Case.)

Q. On the job itself, did some representative from the plaintiff direct you how to do your job?

A. Yes.

Q. Have you ever registered with the Collector of Internal Revenue as a person engaged in transportation of property for hire?

A. Pardon. I didn't quite get that.

Q. Have you ever registered with the Collector of Internal Revenue here as a person engaged in transportation of property for hire?

Mr. Winter: I don't know why it is material. I think that would be something that we might talk about, but I don't see how that is material here now. As a matter of fact, we receive requests for returns every month and a few file them.

Mr. Duffy: The basis for my question is subsection (e) of Section 3475 of this same Act which imposes a transportation tax, and then it provides the criminal penalty. If the Government is attempting to show by their registration with the Public Utilities Commission of Oregon that these men felt they were engaged in transportation of property for hire, I make the equal point that by not registering with the Collector they negate that same proposition.

Mr. Winter: We will stipulate that we receive requests for returns every month and that returns have been made where the Collector has collected on transportation of property. Those are truckers just the same as these, if you want us to admit that.

(Testimony of L. M. Case.)

Mr. Duffy: I don't want you to admit that. I think you get my point. What I want this witness to answer, as a typical [67] truck owner-operator, is whether he is registered with the Collector as one engaged in transporting property for hire.

The Court: He may answer.

A. Yes, I am registered.

Q. (By Mr. Duffy): You have registered?

A. Yes.

Q. When did you make this registration?

A. Well, I think it was soon after I went there.

Q. Did you register for this particular job?

A. I didn't receive any tax paper on the job so I didn't return any.

Q. Did you make any demand upon plaintiffs for transportation tax? A. No, I didn't.

Q. Did you file any return with the Collector or report to him?

Mr. Winter: I submit he has answered. He said he did not collect any transportation tax.

Mr. Duffy: He is required to report to the Collector.

The Court: Ask your question again.

Q. (By Mr. Duffy): Did you make any demand upon the plaintiffs for the transportation tax? A. No, I didn't.

Q. Did you report that fact, or the fact that you were not paid a transportation tax, to the Collector? A. No, I didn't. [68]

(Testimony of L. M. Case.)

Q. What were the terms of your arrangement with the plaintiffs on this Salem Air Base?

A. I hired out myself and truck at so much an hour.

Q. Was there any amount deducted from the amount paid to you for what we have termed payroll insurance?

A. Well, I don't remember just what was deducted. I didn't keep any records. It has been quite a while back.

Q. As far as you can recall, the only item deducted was your wage or that of another driver, driving one of your trucks?

A. I only had one truck.

Q. The company then paid Social Security taxes on you? A. Yes.

Mr. Duffy: That is all.

Redirect Examination

By Mr. Winter:

Q. Have you reported any transportation tax where you have hired out as truck and driver to other companies? A. Yes, I have.

Q. Did those companies always keep your tax and keep you on the payroll as an employee?

A. Some of them do and some don't.

Q. Some don't? A. Yes.

Q. Is it not a fact you receive every month forms of returns as to the transportation tax from the Internal Revenue Department? [69]

A. Yes, I do.

(Testimony of L. M. Case.)

Q. Have you collected any transportation taxes—If you collect any transportation taxes, then you report it and pay it? A. Yes, I did.

Mr. Winters: That is all.

Recross-Examination

By Mr. Duffy:

Q. Did you file any reports while working for these plaintiffs? A. No, I didn't.

Mr. Duffy: That is all.

(Witness excused.) [70]

E. W. ALBANO

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winter:

Q. Your name is E. W. Albano?

A. Yes.

Q. Edward W. Albano? A. Yes.

Q. Where do you reside?

A. 7031 Southeast 41st.

Q. In Portland, Oregon?

A. Portland, Oregon.

Q. You have a license to operate as a carrier for hire under the laws of the State of Oregon?

A. Common carrier on No. 4 PUC permit.

Q. How many trucks do you have?

A. At present I have eight gravel trucks.

Q. Did you have any doing any hauling—Did

(Testimony of E. W. Albano.)

you ever do any hauling for Babler Brothers during the period here involved?

A. Yes, I had two trucks working for them on the Gresham job and two trucks working for them on the Fort Klamath job.

Q. Who were driving those trucks?

A. Well, I believe one of the drivers was a fellow named Holms and another, my brother. [71]

Q. Did Mr. Holms work for you some time? How long did Mr. Holms work for you?

A. Quite some time.

Q. How long would you say?

A. Oh, at that period, three years; that is, three seasons.

Q. He had been driving a truck for you on other jobs besides the Babler jobs?

A. Right.

Q. I think you operated a fleet of eight trucks?

A. Yes.

Q. Who drove the other truck? Were there two trucks? A. Well, I don't remember.

Q. It was your brother, wasn't it?

A. My brother did drive one and a fellow by the name of Holms drove another one.

Q. Were the other six trucks working on other jobs at the time?

A. Yes, they were working on other jobs.

Q. What was the occasion for your agreement with Babler Brothers when you put two trucks to work down there?

(Testimony of E. W. Albano.)

A. Well, I personally had no agreement. The drivers went out and solicited the jobs.

Q. They went out and solicited the jobs?

A. That is right.

Q. What did you receive for the use of your truck and driver [72] on these jobs?

A. Well, sir, what the actual pay was I don't know, but I received a check for the driver's wages and the gas and oil were deducted.

Q. Who carried the public liability and property damage insurance on your trucks?

A. I carry my own fleet insurance.

Q. Who pays for the upkeep, maintenance, and repair, and gas and oil?

A. That is my——

Q. What was the basis for the amount you received for the use of these trucks and drivers?

A. I don't remember.

Q. You don't remember? A. No.

Q. Well, do you recall whether or not the wages and Social Security taxes on the wages of the drivers were deducted from the amount that was paid to you?

A. I remember the driver's wages and gas and oil was deducted.

Q. What about the Social Security and unemployment tax? Was that deducted from your overall pay? A. That I can't remember.

Q. Could Bablers have taken your drivers and put them on other trucks?

(Testimony of E. W. Albano.)

A. Well, that I don't know. I can't answer that question for [73] this reason: At the time these trucks worked it was a short job and I would have no occasion whatsoever——

Q. Could you replace the drivers on these trucks at any time you wanted to?

A. Well, yes, I could have, if there had been occasion for it.

Q. You did replace them whenever you wanted to?

A. Not on a particular job.

Q. On any job which you were on?

A. Yes.

Mr. Winter: I think that is all.

Cross-Examination

By Mr. Duffy:

Q. Did you drive a truck yourself?

A. No, sir.

Q. You were not on any of these jobs personally with your trucks or that your trucks were on with the plaintiffs here, Babler Brothers?

A. No.

Q. And you do not know anything about the operation of them?

A. No.

Mr. Duffy: That is all.

(Witness excused.) [74]

JACK BECKER

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winter:

Q. Your name is Jack Becker? A. Yes.

Q. You are also known as Jacob Becker. What is your correct name, Jacob? A. Yes.

Q. Where do you live, Mr. Becker?

A. 1706 Northeast Going, Portland, Oregon.

Q. How many trucks do you own?

A. At present just one.

Q. During the period December, 1943, through 1945, did you own two trucks?

A. That is right.

Q. Who drove those trucks? Walt Perry?

A. Yes.

Mr. Duffy: Let the witness answer.

Mr. Winter: I am just refreshing his memory.

A. Yes, Walt Perry on Babler's job.

Q. Who hired Walt Perry?

A. I did myself.

Q. Did you have occasion to do any hauling for Bablers during [75] any of this period, any hauling of gravel or truck work?

A. Well, at that time, yes.

Q. What jobs did you work on?

A. Well, the first job I worked on was up at Kennewick, Washington, Toppenish and Clatskanie,

(Testimony of Jack Becker.)

and the following year I worked at Bend, Burns and Fort Klamath. That is the only jobs I worked on for Babler.

Q. As I take it, you drove one truck and Walt Perry drove the other truck?

A. That is right.

Q. Were you employed as a driver or were you employed as a unit, driver and truck?

A. Driver and truck.

Q. What about the other truck?

A. It was driver and truck, too.

Q. As a unit? A. Yes.

Q. The agreement was made with you, was it, for both trucks? A. That is right.

Q. Was any agreement made with Walt Perry except what you made with him? A. No.

Q. Who carried the insurance, public liability and property damage, on the trucks?

A. Myself. I did myself. [76]

Q. Were you licensed by the State of Oregon as a carrier for hire? A. That is right.

Q. And holding license PUC, plates No. 4?

A. That is right.

Q. Who paid for the upkeep and maintenance on the truck? A. I did myself.

Q. Could they have replaced you with anyone on these trucks under your agreement that you had with them? A. Not unless I wanted them to.

Q. Could they have replaced your driver?

A. No.

Mr. Winter: I think that is all.

(Testimony of Jack Becker.)

Cross-Examination

By Mr. Duffy:

Q. You carried this public liability and property damage insurance incidental to your PUC permit, is that right? A. That is right.

Q. Is it not a fact that the company also carried further public liability and property damage insurance on all trucks on the job?

Mr. Winter: We don't know what they might have carried.

A. Not my truck. We carry our own insurance on our trucks.

Q. (By Mr. Duffy): Yes, I understand that, but, in addition to that, do you know whether or not the company also carried [77] similar insurance? A. That I don't know.

Q. Were Social Security amounts deducted from the amounts paid to you? A. That is right.

Q. Did you belong to the union at that time?

A. That is right.

Q. Could the company have terminated your working on the job if they had wanted to?

A. Yes.

Q. On the job itself what right did the company have to tell you how to do the job?

A. Well, it is their job. They just hire trucks and we take orders from them. We have to do as they tell us.

Q. They would tell you where to spot the trucks for loading?

(Testimony of Jack Becker.)

A. Where to haul from and where to.

Q. Where to haul from and where to and what routes to take? A. Yes.

Q. Were you ever paid overtime for working in excess of 40 hours a week?

A. They paid us overtime, yes, if we worked overtime and deducted it from our truck checks.

Q. Did you register with the Collector as a person engaged in the transportation of property for hire? A. Yes. [78]

Q. How did that come about? What caused you to register?

A. Well, the first time I ever paid the 3 per cent transportation tax.

Q. Did you make any demand on the plaintiffs for this transportation tax?

A. No, the first time I ever come in on that would have been 1942, I believe 1942 or 1943. I don't remember any more. On George H. Buckler's job at Vanport we collected it from them and then paid it to the Revenue.

Q. You were told by the company there to go down and register? A. Yes.

Q. Your agreement with the company was to use your trucks and you, in your instance, drove one yourself and your driver drove your other truck?

A. That is right.

Q. Was anything said about how long your work was to continue?

(Testimony of Jack Becker.)

A. No. We always asked them how long the job would last and they would tell us.

Q. They could have discharged you at any time before that? A. Any time.

Q. And you could quit any time you wanted to?

A. Yes.

Mr. Duffy: That is all. [79]

Redirect Examination

By Mr. Winter:

Q. Any day you did not want to take your truck down you would not have taken it down?

A. No.

Q. They could not put any driver on your truck that you did not want on your truck? A. No.

Q. Now, you say Burford—while working for Burford you paid the transportation tax.

A. No, George H. Buckler.

Q. What kind of a job was that?

A. That was at Vanport, when they built Vanport.

Q. You mean just hauling gravel?

A. Yes.

Q. Similar type hauling? A. Yes.

Q. They told you where to put the material?

A. Yes, just hauled it in there on the street.

Q. Then they paid you the transportation tax?

A. Jed Wilson at Seaside, paid it to me, too.

Q. Did they withhold Social Security taxes?

A. Well, most of them, they did.

(Testimony of Jack Becker.)

Q. They held it out and charged it against your truck? A. Yes. [80]

Q. The same as Babler did? A. Yes.

Q. Is that the common practice with what we call gypo haulers?

A. A majority of them, yes.

Mr. Winter: I think that is all.

Recross-Examination

By Mr. Duffy:

Q. Do you know whether or not Mr. Buckler has filed a claim for refund of the transportation taxes? A. No, I don't know.

Mr. Duffy. That is all.

(Witness excused.)

WILLIAM M. ANDERSON

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winter:

Q. Your name is William M. Anderson?

A. Yes.

Q. Where do you reside, Mr. Anderson.

A. 7604 Southeast Lanphear, Milwaukee, Oregon.

Q. How far is Milwaukie from Portland?

A. Where we live it is in the suburbs of Portland.

(Testimony of William M. Anderson.)

Q. Just in the suburbs? A. Yes.

Q. Are you the owner of any trucks?

A. I have two at the present time.

Q. How many trucks did you own during the time involved in this lawsuit, between December, 1942, and December, 1945?

A. Well, I would say from one to three.

Q. Are you licensed under the State of Oregon Motor Transportation Act as a carrier for hire?

A. That is right.

Q. Your trucks carry PUC License No. 4?

A. That is right.

Q. Did you ever have occasion to enter into any agreement for use of your services and truck in hauling for the Bablers? [82] A. Yes.

Q. When was that, Mr. Anderson?

A. The first time I worked for them was in 1941, I think, and off and on since then.

Q. After December, 1942, where did you work?

A. We worked at the Redmond Air Base.

Q. The Redmond Air Base? A. Yes.

Q. How many trucks did you have at that time?

A. Three.

Q. Who were the drivers of those trucks?

A. Well, there were so many of them it would be hard to say—coming and going, you see.

Q. Did you drive one truck?

A. I drove one part of the time, yes.

Q. What was the agreement with Bablers as to the furnishing of three trucks and drivers, or what was your agreement?

(Testimony of William M. Anderson.)

A. Well, it is customary to take your own drivers when you went on a job. You usually do that when you are working somewhere else.

Q. Your own drivers? A. Yes.

Q. You always attempted to hold drivers that you knew were competent. You always attempted to have drivers you knew were competent to take care of your equipment? [83] A. Oh, yes, sure.

Q. Is that what you mean? A. Yes.

Q. Who carried the insurance on your trucks?

A. I had my own. You are required to do that by the State.

Q. Who paid for the upkeep on the trucks?

A. I paid my own.

Q. Did you, under your agreement with Bablers, understand that you had the right to say who should drive your trucks?

A. Yes, as a rule.

Q. Who paid the wages on the trucks?

A. Babler.

Q. Who? A. Babler.

Q. They deducted that from the amount that you got under your agreement, is that right?

A. That is right.

Q. You could have taken your truck off the job at any time, could you?

A. Well, during the war there was the ODT agreement, and I think if they demanded to keep your truck they could at that time.

Q. You mean the Office of Defense Transportation agreement? A. Yes.

(Testimony of William M. Anderson.)

Q. They were certified to the job, weren't they?

A. Not necessarily, but I understood if they wanted to they could hold them.

Q. They could not have fired you and kept the truck? A. That was never brought up.

Q. You don't think they could?

A. No, I don't think so.

Q. You did not understand the agreement that way, did you? A. No, not exactly; no.

Mr. Winter: I think that is all.

Cross-Examination

By Mr. Duffy:

Q. While you worked for Babler did you consider yourself an employee of Babler?

A. Oh, yes.

Mr. Duffy: That is all.

Redirect Examination

By Mr. Winter:

Q. Did you consider your truck as an employee of Babler?

A. Well, they are paying you for use of it.

Q. You could have quit on the job any time you wanted to, outside of this ODT agreement?

A. That is right.

Q. Have you been talking to Mr. Babler since you talked to me this morning? A. No. [85]

Q. Weren't you talking with them in the hall a few minutes ago?

Mr. Duffy: Just a minute, now.

(Testimony of William M. Anderson.)

Q. (By Mr. Winter): You talked with them since we left downstairs at 1:00 o'clock?

A. Oh, yes, right here.

Q. Before you took the stand? A. Yes.

Q. Whom else have you entered into agreements with in connection with your truck?

A. Oh, Ward.

Q. Whom are you working for now?

A. I am not working now.

Q. When were you working for Ward Northwest? A. Oh, last September.

Q. What? A. Last September.

Q. How many trucks did you furnish on that job? A. Just two.

Q. You drove one? A. No.

Q. Did you drive either one of them?

A. No.

Q. Who hired the drivers on those trucks?

A. They were drivers I had when I went there.

Q. They were drivers that you had hired before?

A. Yes.

Q. And they were on the trucks? A. Yes.

Q. You had an agreement with them to do hauling similar to this job here?

A. Yes, the same, practically the same.

Q. Who paid the Social Security tax on their wages? A. They did; the company paid them.

Q. And then they charged it back to you?

A. That is right.

Q. Did they pay the transportation tax to you?

(Testimony of William M. Anderson.)

A. No, they didn't.

Q. Did you file a transportation tax return?

A. No.

Q. When you say you considered Bablers as your employers——

A. At the time when I was working for them, yes.

Mr. Winter: That is all.

(Witness excused.)

Mr. Winter: That is the Government's case, if the Court please.

(Defendant rests.)

Plaintiff's Rebuttal Testimony

J. N. CONLEY

having been previously duly sworn, was recalled as a witness on behalf of Plaintiffs, in rebuttal, and was examined and testified as follows:

Direct Examination

By Mr. Duffy:

Q. Mr. Conley, on these jobs did you rent other equipment besides trucks? A. Oh, yes.

Q. What other kinds of equipment did you rent?

A. Tractors, power shovels, compressors, and all kinds of construction tools that we did not own.

Q. When you rented this equipment were operators furnished with them, in some instances?

A. Yes.

(Testimony of J. N. Conley.)

Mr. Winter: Objected to as incompetent, irrelevant and immaterial. There is no tax asserted here on anything like that. I do not see the materiality of it and it is not proper rebuttal, certainly.

The Court: Go ahead.

Q. (By Mr. Duffy): Were truck drivers ever put on other jobs, other than driving truck?

A. Oh, yes.

Mr. Duffy: That is all. [88]

Cross-Examination

By Mr. Winter:

Q. When they were put on other jobs they were employed for those other jobs, weren't they? They were employed on a different basis?

A. Well, on the same pay, but probably you would call them different, like a jackhammer man. Just take him off a truck and put him on a jackhammer.

Q. Who paid the Social Security tax on the wages then? A. They did.

Q. Did you charge it back to anybody? Did you charge it to any truck?

A. There was no truck involved.

Q. Did you charge it back to anyone?

A. No.

Q. You assumed the burden and paid the tax on that, didn't you? A. Which tax?

Q. The Social Security tax, when a man was driving a tractor for instance?

A. Oh, when a man was driving a tractor, that

(Testimony of J. N. Conley.)

would depend on the deal when you hired the tractor.

Q. If you paid \$50 for a tractor, you generally took the Social Security tax out of the \$50.

A. Yes, we did. [89]

Q. What? A. Yes, we did.

Q. If you hired an operator with it, you mean?

A. If it came fully operated, we charged it back to the owner.

Q. Charged it back to the owner? A. Yes.

Mr. Winter: That is all.

Mr. Duffy: That is all.

(Witness excused.)

(Testimony closed.)

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, Official Reporter of the above-entitled Court, do hereby certify that on the 4th day of April, 1949, I reported in shorthand certain proceedings occurring in the trial of the above-entitled matter, that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction and that the foregoing transcript, consisting of pages numbered 1 to 90, both inclusive, constitutes a full, true and accurate transcript of said proceedings so taken by me in shorthand on said date, as aforesaid, and of the whole thereof.

Dated this 11th day of July, A.D. 1949.

/s/ IRA G. HOLCOMB,
Court Reporter.

[Endorsed]: Nos. 12317-12318-12319. United States Court of Appeals for the Ninth Circuit. Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Appellant, vs. Lloyd Babler, Richard Babler, James A. Pollock and J. H. Schestak, doing business as Lloyd Babler, Appellees; and Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Appellant, vs. J. N. Conley, M. J. Conley and Lloyd Babler, doing business as Babler and Conley, Appellees; and Hugh H. Earle, Collector of Internal Revenue for the District of Oregon, Appellant, vs. J. N. Conley, M. J. Conley, Harry Babler and Lloyd Babler, doing business as Babler Brothers, Appellees. Transcript of Record. Appeals from the United States District Court for the District of Oregon.

Filed August 3, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States
Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12319

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon.

Appellant,

vs.

J. N. CONLEY, M. J. CONLEY, HARRY BAB-
LER and LLOYD BABLER, dba Babler
Brothers,

Appellees.

No. 12318

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Appellant,

vs.

J. N. CONLEY, M. J. CONLEY, and LLOYD
BABLER, dba Babler and Conley,

Appellees.

No. 12317

HUGH H. EARLE, Collector of Internal Revenue
for the District of Oregon,

Appellant,

vs.

LLOYD BABLER, RICHARD BABLER,
JAMES A. POLLOCK and J. H. SCHE-
STAK, dba Lloyd Babler,

Appellees.

ORDER

This matter coming on to be heard this date upon motion of the appellant in the above-entitled proceedings for an order consolidating the three cases as a single case on appeal upon a consolidated transcript of records, and the Court having considered said motion and being advised in the premises,

It Is Ordered that the above-entitled cases be and hereby are consolidated as a single case on appeal upon a consolidated transcript of the records.

Made and entered this 29th day of July, 1949, at San Francisco, California.

/s/ WILLIAM J. HEALY,

/s/ HOMER T. BONE,

/s/ WM. E. ORR,

Judges U. S. Court of Appeals
for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

MOTION TO CONSOLIDATE THE CASES
AND DOCKET ALL THREE AS A SIN-
GLE CASE UPON APPEAL UPON A CON-
SOLIDATED TRANSCRIPT OF THE
RECORDS

Now Comes the appellant in the above-entitled proceedings and states that he has filed notices of

appeal in the United States District Court for the District of Oregon from judgments entered on May 26, 1949; viz: J. N. Conley, et al., dba Babler Bros. v. Earle, Civil No. 4135, J. N. Conley, et al., dba Babler and Conley v. Earle, Civil No. 4134, Lloyd Babler, et al., dba Lloyd Babler v. Earle, Civil No. 4133.

And the said appellant moves that the three cases be consolidated as a single case on appeal upon a consolidated transcript of the records. The grounds of this motion are that the questions of law involved in all three cases are identical and that the facts in the three cases are substantially identical, so that they are susceptible of treatment by consolidation, and the three cases were consolidated for trial in the District Court.

HENRY L. HESS,

United States Attorney for
the District of Oregon.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the Appellees of the foregoing Motion to Consolidate the Cases and Docket All Three as a Single Case Upon Appeal upon a Consolidated Transcript of the Records by depositing in the United States Post Office at Port-

land, Oregon, on the 27th day of July, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Messrs. Carl E. Davidson and Charles P. Duffy, 1525 Yeon Bldg., Portland 4, Oregon, attorneys of record for Appellees.

/s/ GENE B. CONKLIN.

[Endorsed]: Filed Aug. 2, 1949.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH THE
APPELLANT INTENDS TO RELY ON
APPEAL AND APPELLANT'S DESIGNA-
TION OF RECORD FOR PRINTING

Comes now the United States of America, appellant named above, and for a statement of points on which appellant intends to rely on this appeal says.

The statement of points to be urged by appellant in this Court are the same as those set forth in the statements of points with the District Court pursuant to Rule 75(d) of the Federal Rules of Civil Procedure.

Appellant designates for printing under one cover the entire records filed with this Court, and designates one Reporter's Transcript to be contained in the transcript of record.

Dated this day of August, 1949, at Portland,
Oregon.

HENRY L. HESS,

United States Attorney for
the District of Oregon.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Gene B. Conklin, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the Appellees of the foregoing Statement of Points on Which the Appellant Intends to Rely on Appeal and Appellant's Designation of Record for Printing by depositing in the United States Post Office at Portland, Oregon, on the 29th day of August, 1949, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Carl E. Davidson and Charles P. Duffy, 1525 Yeon Building, Portland, Oregon, Attorney of record for appellees.

/s/ GENE B. CONKLIN,

Assistant U. S. Attorney.

[Endorsed]: Filed Aug. 30, 1949.

In the United States
Court of Appeals
for the Ninth Circuit

HUGH H. EARLE, Collector of Internal Revenue for the
District of Oregon,
v. Appellant,
LLOYD BABLER, RICHARD BABLER, JAMES A.
POLLOCK and J. H. SCHESTAK, doing business
as Lloyd Babler,
Appellees.

HUGH H. EARLE, Collector of Internal Revenue for the
District of Oregon,
v. Appellant,
J. N. CONLEY, M. J. CONLEY and LLOYD BABLER,
doing business as Babler and Conley,
Appellees.

HUGH H. EARLE, Collector of Internal Revenue for the
District of Oregon,
v. Appellant,
J. N. CONLEY, M. J. CONLEY, HARRY BABLER and
LLOYD BABLER, doing business as Babler Brothers,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
A. F. PRESCOTT,
GEORGE D. WEBSTER,
*Special Assistants to the
Attorney General.*

HENRY L. HESS,
United States Attorney.
VICTOR E. HARR,
Assistant United States Attorney.

FILED

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**In the United States
Court of Appeals
for the Ninth Circuit**

No. 12317

HUGH H. EARLE, Collector of Internal Revenue for the
District of Oregon,

Appellant,

v.

LLOYD BABLER, RICHARD BABLER, JAMES A.
POLLOCK and J. H. SCHESTAK, doing business
as Lloyd Babler,

Appellees.

No. 12318

HUGH H. EARLE, Collector of Internal Revenue for the
District of Oregon,

Appellant,

v.

J. N. CONLEY, M. J. CONLEY and LLOYD BABLER,
doing business as Babler and Conley,

Appellees.

No. 12319

HUGH H. EARLE, Collector of Internal Revenue for the
District of Oregon,

Appellant,

v.

J. N. CONLEY, M. J. CONLEY, HARRY BABLER and
LLOYD BABLER, doing business as Babler Brothers,
Appellees.

**ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The District Court entered no opinions below. The findings of fact and conclusions of law of the District Court

(R. 14-18, 45-50, 74-78) are not officially reported.

JURISDICTION

These appeals involve federal transportation taxes. The taxes in dispute were paid on October 20, 1947. (R. 16, 47, 76.) Claims for refund were filed on November 7, 1947, and were rejected by notices dated May 27, 1948 (R. 16, 48, 76). Within the time provided in Section 3772 of the Internal Revenue Code, and on June 21, 1948, the taxpayers brought actions in the United States District Court of Oregon for recovery of taxes paid. (R. 4-6, 34-36, 64-66.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. The judgments were entered on May 26, 1949. (R. 19, 51, 79.) Notices of appeal were filed on June 25, 1949 (R. 27, 59, 80), pursuant to the provisions of 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the truck owners performed substantially all the functions of transporting property within the meaning of Section 3475 of the Internal Revenue Code.
2. Whether the driver-owners of certain dump trucks were employees of the taxpayers or whether they were persons engaged in the business of transporting property for

hire within the purview of Section 3475 of the Internal Revenue Code.

3. Whether the drivers of certain dump trucks, to the extent that they did not drive their own trucks, were employees of the taxpayers or employees of the owners of the trucks, and the owners were persons engaged in the business of transporting property for hire within the meaning of Section 3475 of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

These are set forth in Appendix A, *infra*.

STATEMENT

These three suits for refund were consolidated because basically the same question is presented in each case. Three taxpayers are involved here, instead of one, because the membership of the taxpayer-partnership changed from time to time. The taxable period is a continuing one, December 1, 1942—December 31, 1945. (R. 93.)

The facts as found by the District Court¹ (R. 14-17,

1. The Collector contends that these findings are clearly erroneous as to (a) the existence of a lease agreement; (b) the extent of the control exercised by the taxpayers over the truck drivers, in that this control was also exercised by the truck owners.

45-48, 74-16), and the admitted facts of the pre-trial orders (R. 8-10, 38-41, 68-70), may be summarized as follows:

The taxpayers were partners in the general contracting business. As general contractors, they entered into several contracts undertaking certain road construction or resurfacing work. In order to carry out these contracts, the taxpayer-appellees entered into verbal agreements with various truck owners for the purpose of transporting bulk construction material from the stockpiles, quarries, or other locations, to the sites of the roads which they were constructing or resurfacing. In some cases a truck was operated by the owner and in some instances by others. The owners of these trucks were paid on an hourly, load or yard mile basis. (R. 9, 15-16, 39, 46-47, 69, 75.)

The truck drivers, whether they were truck owners or not, were subject to the will and control of the taxpayers, not only as to what should be done but how it should be done, and the taxpayers had the right to discharge the truck drivers, whether truck owners or not. (R. 17, 48, 76.)

On October 20, 1947, the sum of \$893.87, \$173.11, and \$4,537.15 were levied and collected as transportation taxes, penalties and interest. Taxpayers thereafter filed claims for refund, and these claims were subsequently rejected by the Commissioner of Internal Revenue on May 27, 1948. (R. 16, 47-48, 76.)

The taxpayers brought these suits for refund and were

given judgments in the District Court. (R. 18-19, 50-51, 78-79.) These suits are consolidated here as a single case upon a consolidated transcript of records. (R. 172.)

STATEMENT OF POINT TO BE URGED

The court erred in holding that the truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code.

SUMMARY OF ARGUMENT

The transportation tax should have been imposed on the amounts paid by the taxpayers to the truck owners for the transportation of property. Disregarding the particular form of the agreement under which the transportation was effectuated, the truck owners furnished substantially all the facilities for and performed substantially all the functions of transporting property. This is shown both by the facts of the instant cases, and by analogy to the motor carrier cases, in which the situations involving contract carriers have been thoroughly examined.

Further, it is the Collector's contention that the question of the existence of lease agreements in the cases at bar is a question of law reviewable by this Court. However, even assuming it is a question of fact, then the finding as to the

existence of such lease agreements is clearly erroneous. An independent contractor relationship was established rather than that of employer-employee—these were not agreements for the exclusive use of trucks but were contracts for the services of independent truckers.

THE DISTRICT COURT ERRED IN HOLDING THAT THE TRUCK OWNERS WERE NOT PERSONS ENGAGED IN THE BUSINESS OF TRANSPORTING PROPERTY FOR HIRE WITHIN THE PURVIEW OF SECTION 3475 OF THE INTERNAL REVENUE CODE.

- A. Regardless of the form of the arrangements established by the contract, the truck owners furnished substantially all the facilities for and performed substantially all the functions of transporting property.

Bridge Auto Renting Corp. v. Pedrick, 174 F. 2d 733 (C.A. 2d), certiorari denied October 17, 1949, is directive of the disposition to be made of the instant cases. There, the taxpayers were corporations in which the taxpayer-lessor of trucks furnished drivers and handled driver payrolls, subject to reimbursement for all compensation and taxes paid. The drivers were under the exclusive direction and control of the lessees and could only be discharged by them. The majority of the court held (p. 737) that the taxpayer's operations were analagous to those of companies which had been held to be contract carriers "under the Motor Carrier Act," and that the taxpayer substantially performed all the functions of transporting the property. The

court stated (p. 737) that the decision should turn upon the correct answer to the query, "Did the appellant in fact furnish substantially all the facilities for and perform substantially all the functions of, transporting the property * * *."

This case was followed in another recent decision, *John J. Casale, Inc. v. United States* (C. Cls.), decided October 3, 1949 (1949 C.C.H., par. 9409). In this case, the court held that drivers furnished with the taxpayer's trucks were taxpayer's own employees. Thus, the court held that the transaction was within the purview of the taxing statute, stating (p. 13,122):

The taxing statute is not concerned with the form of the arrangements if the substance of the agreements or arrangements between the parties, when considered as a whole, add up to the transportation by one person of the property of another for hire * * *.

Thus, here it seems evident that in substance, the facts add up to such transportation by the truck owners as to come within Section 3475 of the Internal Revenue Code. (Appendix A, *infra*.) The owner-drivers and other drivers were placed on a payroll maintained by the taxpayers. The payments to the drivers were deducted from the amounts paid to the truck owners under the oral agreements, in addition to the deduction for social security, unemployment insurance, state industrial insurance premiums and other charges. (R. 97-107.) Thus, wages were constructively

paid by the truck owners. (R. 14.) Further, the truck owners paid all operating and maintenance expenses of their trucks, purchased their own Public Utility Commission permits as carriers for hire, and carried and paid for their own public liability and property damage insurance. (R. 155, 158.) The truck owners, in addition to the contractors, had a right to discharge drivers. (R. 156.) Also, some of the truck owners, simultaneously with their operations with the taxpayers, performed similar functions with other equipment for other contractors. (R. 154.)

In addition, by analogy to the cases arising under the Motor Carrier Act, 1935, which by the Act of August 9, 1935, c. 498, 49 Stat. 543, Sec. I, was made Part II, Interstate Commerce Act, c. 104, 24 Stat. 379, it seems clear that substantially all the functions of transporting property were performed in order to bring the truck owners within the category of contract carriers, and hence make the transportation subject to tax.

Section 3475 of the Internal Revenue Code imposes a tax on "* * * amounts paid to a person engaged in the business of transporting property for hire * * *." Section 143.1 of Treasury Regulations 113 (Appendix A, *infra*), further defines the term "person engaged in the business of transporting property for hire" to include a "contract carrier."

These Regulations no doubt interpreted the taxing

statute in the light of the Motor Carrier Act, 1935, *supra*. In Section 203 (a) (15) of this Act (49 U.S.C. 1946 ed., Sec. 303), the term "contract carrier by motor vehicle" was defined to mean any person, not a common carrier, "who or which, under special and individual contracts or agreements, and whether directly or by lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation"—language which is similar to that in Section 3475 of the Internal Revenue Code, except for the limitation as to interstate or foreign commerce.

Further, there is no reason to suppose that Congress did not at least intend to apply the transportation tax of the Internal Revenue Code to the same thing that it meant to regulate in the Motor Carrier Act. As stated in *Bridge Auto Renting Corp. v. Pedrick*, *supra*, pp. 737-738, "the problem is much the same."

Therefore, in applying the law in this area to see if the truck owners involved in the instant cases would be subject to regulation as contract carriers under the Motor Carrier Act, we find a persuasive answer.

In *Motor Haulage Co. v. United States*, 46 M.C.C. 107, 70 F. Supp. 17 (E.D. N.Y.), affirmed, 331 U.S. 784, the company sought to set aside an order of the Interstate Commerce Commission imposing conditions upon the granting of a permit to it as a contract carrier based upon grandfather

rights on the ground that it was not a contract carrier with respect to certain of its so-called contracts of rental without responsibility and that it was, therefore, improper to limit its operations thereunder. The court in holding that the company was engaging in transportation for compensation, and that it was therefore a contract carrier, summarized the situation as follows (p. 21):

We are speaking of a case where the plaintiff furnishes not only the vehicle but the driver, is compensated, on a mileage or time basis, pays the hire and other incidental expense of the driver, agrees to maintain the leased equipment in good order and repair, to carry insurance, and to garage and fuel the trucks, but does not specifically undertake to transport cargo or to be responsible for loss or damage.

One contract of rental in the *Motor Haulage* case, *supra*, is particularly significant. It specifically provided that the drivers furnished by the lessor should be employees of the lessee, and that the lessor did not assume any responsibility

for the direction, or any of the acts, of such employees.² This situation goes further than that in the instant cases, and yet the lessor was held to be a contract carrier. The Commission held that this clause did not overcome the presumption of for-hire transportation, stating (46 M.C.C. 107, 118):

This presumption is not overcome by the mere fact that the contracts provide that the drivers are the employees of the shipper and that Motor Haulage does not assume any responsibility for the direction, or any of the acts, of such drivers. The drivers' wages, compensation insurance, and social security are all paid by Motor Haulage. Although it is reimbursed therefor by the shipper, this amounts to nothing more than additional compensation for Motor Haulage's service, sup-

2. The full text of this provision which is quoted in the opinion of the Commission (46 M.C.C. 107, 116) is as follows:

For the sole convenience of the lessee (shipper) the lessor (Motor Haulage), if requested by the lessee so to do, shall pay the wages, compensation insurance, Social Security taxes, and bonding fees of the employees engaged by the lessee to act as chauffeurs and helpers on the said vehicles and shall charge the lessee the cost thereof plus 1% for handling charges, but in the performance of this service the lessor does not assume any responsibility for the direction or any of the acts, of such employees of the lessee, and the act of performing this service by the lessor for the lessee's convenience shall not in any way relieve the lessee from any of its responsibilities set forth under the several clauses of this agreement.

plementing the amounts specified in the written contracts.

It has been repeatedly held by the Interstate Commerce Commission that a lessor of trucks who furnishes drivers is a contract carrier. *Edward Allen Carroll*, 1 M.C.C. 788; *Bonner Hauling Co.*, 41 M.C.C. 404; *Consolidated Trucking, Inc.*, 41 M.C.C. 737; *McKeown Transportation Co.*, 42 M.C.C. 792; *Transportation Activities of Wartena*, 44 M.C.C. 131.

In the *Motor Haulage* case, *supra*, and in the instant cases, the truck owners were compensated on a mileage or time basis (R. 16), paid for the upkeep and maintenance, and carried insurance on the equipment (R. 158). Here, the owners, like carriers, directed the drivers to follow the instructions of the customers (taxpayers) with respect to the time of reporting, the material to be transported, and the place of origin and destination—these are the instructions given by a customer to a carrier. Hence, it seems that the truck-owners were contract carriers; hence, this is precisely the type of situation the taxing statute is designed to include.

It follows then that on the particular facts of the instant cases or by analogy to the motor carrier cases, regardless of the form of the agreement, the truck-owners furnished substantially all the facilities for and performed substantially all the functions of transporting property.

B. The agreements here were not leases but amountd to arrangments in which the transportation was furnished by the truck owners.

Even though the nature of the agreements here is relevant, the Collector contends that they were not leases. The question as to whether there were verbal lease agreements in the instant cases, in that it is relative to the interpretation of contracts, presents a question of law to this Court. *Hamilton v. Liverpool &c. Ins. Co.*, 136 U.S. 242; 3 Williston, Contracts, Sec. 616 (1936 ed.).

However, assuming *arguendo* that a question of fact is presented, the Collector contends that on the entire evidence the findings are clearly erroneous, within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure. As stated in *United States v. Gypsum Co.*, 333 U.S. 364, 395:

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

The Public Utility Commission permits were held by the truck owners, and not by the taxpayers. However, if a lease of the trucks was made, then it was necessary that the permits be held by the lessee. (R. 122-126.) Further, the so-called leases of the trucks involved in the cases at bar are not real leases at all. A real lease presupposes a surrender to the lessee of such exclusive possession and control as to give the lessee the exclusive use of the trucks for a given period of time. Contrariwise, the parties here contracted

for services only. The determinative factor as to the existence of a lease in these cases is whether or not the employment status was that of employer-employee or independent contractor. If the latter, then clearly, no lease was made, and the taxing statute is inapplicable. M.T. 9, 1943 Cum. Bull. 1159.

Few problems in the law have given a greater variety of application and conflict in results than in cases in the borderland between what is clearly an employer-employee relationship and what is one of independent, entrepreneurial dealing. See Part I, Douglas, Vicarious Liability and Administration of Risk, 38 Yale L. J. 584 (1929). The courts have long wrestled with this problem, and the traditional common law test—the physical control test employed in tort cases, including the related workmen's compensation cases—has not provided a definitive answer. It requires that the courts consider and weigh a number of familiar factors; it is not an automatic standard nor one in which each factor receives a mathematical predeterminable amount of weight. Further, the courts have varied greatly in the application of these factors and the results they reach.³

3. In the interpretation of certain statutory concepts where the employer-employee relationship is of pivotal importance, it has been recognized that it is difficult to fit economic relationships neatly into the categories "employer" and "employee," which an earlier law had shaped for a different purpose. See *Labor Board v. Hearst Publications*, 322 U.S. 111; *United States v. Silk*, 331 U.S. 704.

Most informative as to the correct result to be reached in the instant cases are the criteria of the employment relation set forth in the Restatement of the Law, Agency, Sec. 220. (See Appendix B, *infra*.) A consideration of these factors relative to the informative case in this area, *Bridge Auto Renting Corp. v. Pedrick*, *supra*, and the cases at bar, impels the conclusion here that the truck owners were independent contractors. In both groups of cases there was a distinct occupation, the workmen supplied their own instrumentalities⁴ (R. 148, 153), the payment was on a time, load or yard-mile basis, the operating expenses were paid by the truck owners (R. 158), and the parties considered themselves to be creating an independent contractor relationship (R. 147-149).

Of importance is the control factor, the nonexistence of which may be established by evidence of many kinds. As Professor Seavey concludes in *Speculations As To "Respondeat Superior,"* Harvard Legal Essays, pp. 433, 458 (1934)—

It is quite true that in most of the master and servant situations there is no physical control by the master, but the relationship ordinarily carries with it a power

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4. See Restatement of the Law, Agency, Section 220: Illustration 6. "P employs A to drive him around in A's automobile. The inference is that A is not P's servant."

of control over the servant through economic subjection * * *.

However, that kind of control does not exist here where the truck owner may have other trucks working with other contractors. *Harrison v. Greyvan Lines*, decided with *United States v. Silk*, 331 U.S. 704.

The principal question is similar to that posed in a case considered by this Court, *Anglim v. Empire Star Mines Co.*, 129 F. 2d 914. There, the lessor-owners rented certain coal mines to individual miners. In holding the miners to be individual contractors, despite the fact that the owner furnished most of the mining tools, and had the right to require the discharge of objectionable workmen, this court stated (p. 917):

The lessors appear both in theory and in practice to have been really independent contractors. In respect of the right of the lessor to request the discharge of objectionable workmen, the court found that, as mutually understood, its retention was for purpose only of suppressing highgrading and of insuring compliance with safety regulations so essential in underground work.—The lessor's supplying tools, is, of course, an evidentiary factor of weight.—*The quality of the relationship is to be judged by the presence or absence of no single evidentiary factor, but by an overall view.* (Italics supplied.)

United States v. Silk and *Harrison v. Greyvan Lines*, both *supra*, are also of relevance. These cases held the owner-drivers employed by Silk, a coal company, and by

Greyvan, a trucking company—in spite of the approach of the court i.e., broader and more factual than the common law test—to be independent contractees. The Court stated (p. 719):

But we agree with the decisions below in *Silk* and *Greyvan* that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small business men. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that makes these driver-owners as independent contractors.

See, also, *United States v. Mutual Trucking Co.*, 141 F. 2d 655 (C.A. 6th); *Glenn v. Standard Oil Co.*, 148 F. 2d 51 (C.A. 6th).

All of these cases seem to be directly in point. One of them is a decision of this Court. They are sound applications of the law, and it is evident, on their reasoning, that the transportation here was not accomplished by the taxpayers themselves (lease) but through the medium of independent contractors (no lease). The problem in these cases many times is to find out if there has been an agreement to lop off the particular function in question from one person's enterprise and to allocate it to another. This is

precisely the situation here, and what we find is essentially an inter-business rather than an intra-business activity; it was clearly a transportation of property for compensation.

In *Boston Elevated Railway Co. v. Malley*, 288 Fed. 864 (Mass.), while it was recognized that the degree of control over a vessel given the respective parties under a charter determined whether it was essentially a lease of the vessel or a contract for transportation services, it was held that amounts were paid for transportation, where the agreement required the owner to provide the personnel, supplies and bunker coal, and to maintain the vessel. The role of the truck owners in the instant case was not substantially different.

The only appellate decision involving this precise situation relative to the transportation tax, *Bridge Auto Renting Corp. v. Pedrick*, *supra*, has already been discussed. The other decided cases, interpretative of Section 3475 of the Internal Revenue Code, if contrary, are clearly wrong.

In *Ohio River Sand Co. v. United States*, 60 F. Supp. 563 (W.D. Ky.), a tax was levied upon payments made under an agreement to furnish a tug motor boat to an oil company for the purpose of towing empty or loaded barges. The owner was responsible for navigation and furnished his own crew. The case is distinguishable, in part, in that the compensation there had no relation to the amount of use. *Bridge Auto Renting Corp. v. Pedrick*, *supra*, p. 738, stated

that this case should not be followed. It is in fact inconsistent with the contrary conclusion arrived at in the *Boston Elevated Railway Co.* case, *supra*.

In *Lyle v. United States*, 76 F. Supp. 787 (N.D. Ga.), the court held that the movement of earth by dump trucks in connection with grading and leveling operations in the construction of an airfield, all of which movements, being within the confines of the airfield, did not constitute transportation within the meaning of the taxing statute. This case, therefore, has no relevancy here where the movements, instead of 1,500 feet, were up to ten miles (R. 117), and Public Utility Commission permits were required (R. 122-126). In *Williams v. United States*, 72 F. Supp. 300 (Ariz.), the owner did nothing but rent trucks, and the lessee of the trucks obtained the drivers, paid their wages and incidental expenses, garaged the trucks on the job site, and maintained exclusive control of their operations, except for maintenance.

CONCLUSION

For the above reasons, it is submitted that the judgment below should be reversed.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
A. F. PRESCOTT,
GEORGE D. WEBSTER,
*Special Assistants to the
Attorney General.*

HENRY L. HESS,
United States Attorney.

VICTOR E. HARR,
Assistant United States Attorney.

NOVEMBER, 1949.

APPENDIX A.

Internal Revenue Code:

SEC. 3475. TRANSPORTATION OF PROPERTY.

(a) *Tax*.—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation.

* * * *

(26 U.S.C. 1946 ed., Sec. 3475.)

Treasury Regulations 113 (1943 ed.), promulgated under the Internal Revenue Code:

Sec. 143.1.

Meaning of Terms.—As used in these regulations, unless otherwise specified or indicated by the context—

(a) *General.*—The terms defined in the applicable provisions of law shall have the meanings so assigned to them.

(b) *Person engaged in the business of transporting property for hire.*—The term “person engaged in the business of transporting property for hire” includes a common carrier, contract carrier, local moving or drayage concern, freight forwarder, express company, or other person transporting property for hire wholly or in part by rail, motor vehicle, water, or air.

(c) *Carrier.*—The term “carrier” is coextensive with the term “person engaged in the business of transporting property for hire.”

(d) *Transportation.* — The term “transportation” as used herein means the movement of property by a person engaged in the business of transporting property for hire, including interstate, intrastate, and intracity or other local movements, as well as towing, ferrying, switching, etc. In general it includes accessory services furnished in connection with a transportation movement, such as loading, unloading, blocking and staking, elevation, transfer in transit, ventilation, refrigeration, icing, storage, demurrage, lighterage, trimming of cargo in vessels, wharfage, handling, feeding and watering live stock, and similar services and facilities.

(e) *Property.* — The term “property” means any physical matter regardless of value over which the right of ownership or control may be exercised, including

currency, documents, papers of all kinds, etc.

* * * *

Sec. 143.13.—*Application of Tax.*—

(a) *In general.*—The tax is payable by the person making the taxable transportation payment and is collectible by the person receiving such payment. (See section 143.50.)

The tax applies to the total amount paid within the United States for transportation of property from one point in the United States to another, even though while en route part of the transportation movement is through a foreign country.

The tax applies to any payment, not specifically exempted, for the transportation of property, made to a person engaged in the business of transporting property for hire, including a payment made by one such person to another, but not including an amount paid by a carrier, a freight forwarder, express company, or similar person for transportation with respect to which a tax is payable to such person.

The tax applies only to amounts paid after December 1, 1942, for transportation which originated on or after that date. No tax attaches to payments for transportation originating prior to the first moment of December 1, 1942. Payments made prior to December 2, 1942, are not taxable regardless of when the transportation occurs.

In the case of property transported from a point without the United States to a point within the United States the tax applies to any amount paid within the United States for that part of the transportation which takes place within the United States.

Where the amount paid in the United States covers the entire movement of property from point of origin in a foreign country to an inland point in the United States, the tax will apply to the pro rata part of such payment which represents transportation within the United States. However, in the case of shipments of foreign origin arriving by water, no tax will attach to transportation or services performed prior to the unloading of property at the port of first arrival.

The tax does not apply: (1) to an amount paid outside the United States for the transportation of property from a point without the United States to a point within the United States; (2) to an amount paid by a carrier, freight forwarder, express company, or similar person for the transportation of property with respect to which a tax is payable to such carrier, freight forwarder, express company, or similar person; or (3) to an amount paid for the transportation of property in course of exportation or shipment to a possession of the United States and actually so exported or shipped (see section 143.30). For governmental exemptions see Subpart D.

APPENDIX B.

Restatement of the Law, Agency:

SEC. 220. *Definition.*

* * * *

(2) In determining whether one acting for another is a servant or independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer; and

(i) whether or not the parties believe they are creating the relationship of master and servant.



**In the United States
Court of Appeals
for the Ninth Circuit**

HUGH H. EARLE, Collector of Internal Revenue for the
District of Oregon,

v.

Appellant,

LLOYD BABLER, RICHARD BABLER, JAMES A.
POLLOCK and J. H. SCHESTAK, doing business
as Lloyd Babler,

Appellees.

HUGH H. EARLE, Collector of Internal Revenue for the
District of Oregon,

v.

Appellant,

J. N. CONLEY, M. J. CONLEY and LLOYD BABLER,
doing business as Babler and Conley,

Appellees.

HUGH H. EARLE, Collector of Internal Revenue for the
District of Oregon,

v.

Appellant,

J. N. CONLEY, M. J. CONLEY, HARRY BABLER and
LLOYD BABLER, doing business as Babler Brothers,

Appellees.

On Appeals from the United States District Court
for the District of Oregon

BRIEF FOR THE APPELLEES

CARL E. DAVIDSON,
CHARLES P. DUFFY,
Attorneys for Appellees.

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**In the United States
Court of Appeals
for the Ninth Circuit**

No. 12317

HUGH H. EARLE, Collector of Internal Revenue for the
District of Oregon,
v. Appellant,
LLOYD BABLER, RICHARD BABLER, JAMES A.
POLLOCK and J. H. SCHESTAK, doing business
as Lloyd Babler,
Appellees.

No. 12318

HUGH H. EARLE, Collector of Internal Revenue for the
District of Oregon,
v. Appellant,
J. N. CONLEY, M. J. CONLEY and LLOYD BABLER,
doing business as Babler and Conley,
Appellees.

No. 12319

HUGH H. EARLE, Collector of Internal Revenue for the
District of Oregon,
v. Appellant,
J. N. CONLEY, M. J. CONLEY, HARRY BABLER and
LLOYD BABLER, doing business as Babler Brothers,
Appellees.

**On Appeals from the United States District Court
for the District of Oregon**

BRIEF FOR THE APPELLEES

PRELIMINARY STATEMENT

These appeals involve three consolidated actions for the recovery of taxes on amounts alleged to have been paid for the transportation of property, together with penalties and

interest thereon, assessed by the Commissioner of Internal Revenue and collected from appellees by appellant purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States (26 U.S.C. 3475), the pertinent parts of which are as follows:

“(a) Tax. There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid. . . . Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company or similar person. . . .

“(c) Returns and payment. The tax imposed by this section shall be paid by the person making the payment subject to the tax. Each person receiving any payment specified in subsection (a) shall collect the amount of the tax imposed from the person making such payment, and shall, on or before the last day of each month, make a return, under oath, for the preceding month, and pay the taxes so collected to the collector in the district in which his principal place of business is located. . . .”

During the periods of time involved in these actions, the respective appellees were engaged as partners in a general contracting business. As a part of that business, appellees entered into several contracts whereby they undertook

certain road and airport construction and resurfacing work and, in order to supplement their own equipment and carry out said contracts, entered into verbal lease agreements with various owners of trucks for the purpose of transporting bulk construction materials from stock piles, quarries, and other locations to the sites of the roads and airports which they were constructing or resurfacing. The owners of the trucks were paid a rental on an hourly, load, or yard mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others. (R. 15-16; 46-47; 75.)

The Commissioner of Internal Revenue, asserting that the truck owner-operators and drivers were not the employees of the appellees and that the truck owners were persons engaged in the business of transporting property for hire, assessed a tax against the appellees equal to 3 per cent of the amounts paid by appellees to said truck owner-operators and drivers during the respective periods, together with penalties and interest thereon. (R. 16; 47; 76.)

Appellees, under threat of seizure and sale of their property by appellant, paid to appellant the full amount of such transportation taxes, penalties and interest assessed, and thereafter filed claims for refund of such amounts. The claims being denied, appellees brought these actions which resulted in the judgments which are the subject of these appeals. (R. 16; 47-48; 76.)

Although \$11.25 of the \$173.11 tax involved in No. 12318 was assessed on amounts alleged to have been paid for the transportation of persons under the provisions of Section 3469 of the Internal Revenue Code (26 U. S. C. 3469), because appellees in that case also entered into similar agreements with truck owners for the purpose of transporting some of their employees to the site of a construction job, appellees will not discuss this minor subject, except to state that it is doubtful that Congress ever envisioned the assessment of such tax in this situation. The trial court found that such transportation of a few of appellees' employees to the site of a construction job did not constitute the transportation of persons within the purview of Section 3469 of the Internal Revenue Code. (R. 49.)

APPELLEES' CONTENTIONS

Appellees contend and the trial court so found (R. 18; 49; 77) that the taxes on the transportation of property were illegally assessed and collected from them for either one of the following reasons:

1. All of the truck drivers, whether they owned their own trucks or not, were employees of the appellees and hence were not "persons engaged in the business of transporting property for hire" as specified in Section 3475 of the Internal Revenue Code.

2. The hauling for the highway and air base construction work involved here did not constitute "transportation . . . of property by . . . motor vehicle . . . from one point in the United States to another" within the meaning of the Act, or, as stated in appellees' refund claims: "The hauling was not in itself an independent calling, but was a minor part of our general contracting business." (Appellees' Exhibits 2, 3, and 4; R. 121-122.)

ARGUMENT

I.

All of the truck drivers, whether truck owners or not, were employees of the respective appellees during the periods in question and hence were not "persons engaged in the business of transporting property for hire."

a. Effect of employer-employee relationship on applicability of transportation tax.

Appellant properly concedes on page 14 of his brief that if the relationship of employer and employee existed between these appellees and the truck drivers during the periods involved, that the drivers were, ipso facto, not "persons engaged in the business of transporting property for hire" and that the tax should be refunded. This has been the consistent position of the Commissioner of Internal Revenue. *M. T. 9, 1943 C. B. 1159.*

"If the relationship of employer and employee exists for federal employment tax purposes between the independent owner-truckers and the persons who engaged their services, the amounts paid to such truckers by their employers are not subject to the tax on the transportation of property as long as such relationship exists." *Letter Ruling, Bureau of Internal Revenue, dated February 4, 1943, Federal Tax Service, Prentice-Hall, 1943, Par. 66,112.*

b. Federal employment tax regulations and decisions.

In view of the foregoing, we turn to the question as to whether or not the relationship of employer and employee existed for federal employment tax purposes between the owner-truckers and other drivers and the appellees.

As the court knows, federal employment taxes are imposed upon employers under the provisions of Chapter 9 of Title 26, United States Code. These include the Social Security tax of 1 per cent of wages as provided by Section 1410 et seq (Subchapter A) and the additional tax of 3 per cent on employers of eight or more as provided by Section 1600 et seq (Subchapter C) of Title 26. Sections 1426(d) and 1607(i) are identical, defining "employee" as follows:

"Employee. The term 'employee' includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contrac-

tor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules."

These definitions were inserted in the Act on June 13, 1948, and were made retroactive to February 10, 1939, by Section 1 (b) of the Act. They reaffirmed the common-law rules after the decisions of the Supreme Court of the United States in *United States v. Silk*, and *Harrison v. Greyvan Lines, Inc.*, (1947) 331 U. S. 704, 67 S. Ct. 1463; *Paragraph 7, Report No. 1255 of Senate Finance Committee on H. J. Res. 296.*

The regulations and decisions of the Bureau of Internal Revenue would establish the employer-employee relationship here for federal employment tax purposes, even though we disregarded the common-law rules. Section 403.204 of Regulations 107 issued by the Commissioner of Internal Revenue, interpreting Section 1607 (i) of Title 26, provides in part as follows:

"Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

"Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee

is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists. . . ."

In each of the cases at bar, the District Court made the following finding of fact:

"All of said truck drivers, whether they were truck owners or not, were subject to the will and control of the plaintiffs not only as to what should be done but how it should be done, and plaintiffs had the right to discharge said truck drivers, whether truck owners or not, at any time." (R. 17; 48; 76.)

In factual situations almost identical to the instant cases, the Bureau of Internal Revenue has uniformly ruled that the truck owner-drivers are employees, not independent contractors. *S. S. T. 403*, 1940-2 *C. B.* 250; *S. S. T. 307*, 1938-2 *C. B.* 279; and *S. S. T. 198*, 1937-2 *C. B.* 393. The federal courts have agreed. The summary of the unreported decision of the United States District Court for the Western District of Michigan, Southern Division, dated March 30, 1943, in the case of *Grand Rapids Gravel Co. v. United States*, found in Commerce Clearing House Federal Unem-

ployment Insurance Service, Paragraph 5054.90, reads:

"Individuals who owned trucks and who operated such trucks in hauling sand and gravel for plaintiff during the period 1936-1940 on a yardage or tonnage basis were held to be employees of plaintiff for employment tax purposes, and not independent contractors. The Court found that plaintiff had the right to discharge the truck operators at will and without liability for so doing, and that the amount of work done by each of the operators and the time and place of performance as to each load were wholly within the discretion of plaintiff or its agents. The fact that the drivers owned their own trucks, that a portion of their work was, of necessity, upon the public highways, and that they were paid for hauling on a yardage basis is insufficient to outweigh the deductions which follow from other facts concerning circumstances under which the services were performed."

Ohio River Sand Co. v. United States, 60 F. Supp. 563, also has some features similar to our cases. Plaintiff furnished a tugboat, together with the operator and a full crew and all necessary fuel and operating supplies, to the Standard Oil Company at a daily rental for the purpose of hauling barges on the Mississippi River. The Standard Oil Company furnished the master of the boat and gave all instructions and sailing directions. The court held that the transportation tax was improperly assessed and collected for the reason that plaintiff was not "engaged in the business of transporting property for hire" but had leased its boat on a rental basis. We contend, and the trial court so found,

that the trucks involved in these cases were in the same category. (R. 15; 46-47; 75.)

The Commissioner of Internal Revenue, in declaring when the employer-employee relationship exists for federal employment tax purposes, agrees with the common-law rule that "the really essential element of the relationship is the right of control," 35 *Am. Jur., Master and Servant, Section 3*.

c. Application of state law.

Since common-law rules are to be applied in determining whether the employer-employee relationship exists, we must of necessity look to the decisions of the Supreme Court of the State of Oregon. "There is no federal general common law." *Erie R. Co. v. Tompkins*, (1938) 304 U. S. 64, 58 S. Ct. 817. *Section 1652 of Title 28, United States Code*, as amended, is as follows:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The above section is, except for phraseology, the same as Section 725 of Title 28, which it superseded. Numerous authorities applying the statute to matters of taxation are cited under Note 157 to this section of the United States Code Annotated. As this court pointed out in the case of

United States v. Lambeth, Par. 9386, 1949 C.C.H. Fed. Tax Reporter, decided August 19, 1949: "The application of a Federal statute may be conditioned upon a status determined by local law."

The recent decision of the Supreme Court of the State of Oregon in *Bowser v. State Industrial Accident Commission*, decided October 24, 1947, 182 Or. 42; 285 Pac. (2d) 891, involved the status of a log hauler furnishing his own truck and hauling logs for a logging company at stated prices per thousand. The sole issue presented was whether the truck driver-owner was an employee or an independent contractor. The court discussed the authorities at length (they are also collected in 42 A. L. R. 607; 43 A. L. R. 1312; and 120 A. L. R. 1031) and concluded that the truck driver-owner was an employee, not an independent contractor. The facts as detailed in the opinion bear a striking resemblance to the facts in the instant cases. The court designated control as the primary test and certain other tests as secondary.

We submit that the evidence in the cases at bar demonstrated that appellees not only had the right to control the progress of the work and the exact manner of accomplishing the results, but that they did in fact exercise that control. The truck drivers were directed by appellees' agents as to how, where, when, and what to haul. (R. 128-130; 159-160.)

The tests set out in the *Bowser* opinion, when applied here, would seem to clearly show that the relationship of employer and employee existed between the truck drivers and the appellees. Summarizing its opinion, the Oregon Supreme Court said, at page 63:

"From the foregoing it appears that the logging company not only had the right and power to control the operation, but to a great degree actually exercised that right; that it had a right to terminate the relationship at will without liability; that the nature of the work was such that respondent was not required to do a specific piece of work, but only such as the company could provide from day to day when it wanted to operate; that the mode of making compensation (by the thousand) could as well be considered wages as returns from a contract, and that respondent rendered services exclusively for the company—all these circumstances point to the relationship of employer and employee. As against this, the only fact pointing in the other direction is the ownership and maintenance of the truck and semi-trailer by respondent. As the cases point out, that is not conclusive."

On page 13 of appellant's brief he attempts to make a point of the fact that the Public Utility Commission permits in the instant cases were held by the truck owners, not the appellees. As appellant's own witness testified (R. 125-126), log haulers like *Bowser* have the same permits.

II.

The hauling of the bulk construction materials from

stock piles, quarries, and other locations to the sites of the roads and airports which appellees were constructing or re-surfacing did not constitute the transportation of property within the purview of Section 3475 of the Internal Revenue Code.

Assuming for the sake of argument that the truck drivers were not subject to the control of appellees and that they were independent contractors, we turn to the other phase of these cases, namely, whether this was "transportation of property" within the meaning of the transportation tax statute. We submit that Congress never intended that the transportation tax should be applied to operations similar to those conducted by the appellees herein. The only two cases we have been able to find which had somewhat similar factual situations are *J. D. Williams et al v. United States*, D. C. Ariz., 72 F. Supp. 300, decided March 21, 1947, and *Charles M. Lyle v. United States*, D. C. Ga., 76 F. Supp. 787, decided February 2, 1948, both of which ordered a refund of transportation taxes collected. The government appealed neither of those decisions.

In the *Williams* case, plaintiff Williams was the owner of a fleet of trucks, the other plaintiffs were contractors engaged in the construction of airports, roads, and facilities. To augment their construction equipment, the contractors rented, from time to time, from plaintiff Williams certain dump and tank trucks under verbal agreements to pay, as

rents, certain rates, standard in the community, per hour, per yard or per ton, for use on a fully operated basis. The District Court found that the contractors had the right to exercise, and did exercise, exclusive possession, direction and control of the trucks in their operations. Operators of the trucks were ordered from the union hall and immediately went on the payroll of the contractors. "Thereafter their wages, income and Social Security taxes, Workman's Compensation premiums and other usual incidents of employment were paid and handled by the contractors in all respects the same as for their other employees. . . Periodically, the contractors computed the rental due at the applicable rates, deducted amounts paid by them for fuel, payrolls, and so forth, and paid J. D. Williams the balance."

We submit that the facts in the *Williams* case are almost on all fours with appellees' cases here. The District Court made the following conclusions of law:

"1. That at all times during the rental periods, the operators of the rented trucks were employees of the contractor plaintiffs.

"2. That the use of the rented trucks was incidental to construction operations of contractor plaintiffs and not transportation of property within the meaning of those words as used in Section 3475, I. R. C.

"3. That to the extent said trucks were engaged in the transportation of property such transportation was performed by the contractor plaintiffs and not by plaintiff Williams.

"4. That plaintiffs are entitled to judgment as prayed for in their complaint."

The facts in the *Lyle* case, *supra*, are not quite as apposite as in the *Williams* case, inasmuch as all of the hauling there involved was within the boundaries of the airport which plaintiffs were constructing. The District Court, in deciding that plaintiff was entitled to a refund of the transportation taxes paid, based its decision principally upon the words in the statute: "from one point in the United States to another" and said:

"The transactions as set forth in the findings of fact did not constitute transportation of property from one point in the United States to another, within the meaning of Section 3475 of the Internal Revenue Code, and the payment of an hourly rental for dump trucks used only within the confines of the airfield being leveled, and as an incident of the grading and leveling of such airfield, was not a payment for the transportation of property within the terms of the statute just cited. Neither the statute, nor the regulations issued pursuant thereto, either expressly or by fair implication, evidence any applicability to transactions of the kind now under consideration, but, on the contrary, evidence intent to subject to tax liability payments made for transportation in the manner and by the means specified as the language employed is commonly understood in the light of present day transportation practices and custom. The hauling of dirt by dump trucks hired upon an hourly basis, which are used exclusively in the leveling of an airfield, and within its confines only, presents none of the elements of trans-

portation as that term is generally understood.”

Although the hauling in the instant cases went beyond the boundaries of the airports which were being constructed, in order to secure rock or cinders from nearby pits or quarries, we do not feel that Congress ever intended to tax such operations which were merely a minor integral part of appellees’ general contracting business. (Appellees’ Exhibits 2, 3 and 4; R. 121-122.)

III.

The findings of fact made by the trial court are not “clearly erroneous” and should be sustained under Rule 52(a) of the Federal Rules of Civil Procedure.

After fully considering all of the evidence introduced by both parties upon the trial of these cases, the District Court found that the respective appellees had entered into verbal lease agreements with the truck owners (R. 15; 46-47; 75), and that all of the truck drivers, whether they were truck owners or not, were subject to the will and control of the appellees, not only as to what should be done but how it should be done (R. 17; 48; 76), and found that appellees had the right to discharge the truck drivers, whether truck owners or not, at any time. (R. 17; 48; 16.) From these and other findings of fact, the District Court concluded that the truck drivers were employees of the appellees, that the truck owners were not persons engaged

in the business of transporting property for hire and that the hauling in question did not constitute the transportation of property within the purview of Section 3475 of the Internal Revenue Code. (R. 17; 48-49; 77.) We submit that the testimony adduced upon the trial of these cases, even by appellant's own witnesses, furnished a reasonable basis for the findings of the trial court and that they should be sustained.

CASES CITED BY APPELLANT

We think it is fair to say that appellant chiefly relies upon the decisions in *Bridge Auto Renting Corp. v. Pedrick* (C. A. 2d), 174 Fed. (2d) 733, and *John J. Casale, Inc., v. The United States*, a Court of Claims decision reported at Paragraph 9409 of the 1949 Commerce Clearing House Federal Tax Reporter, in both of which the transportation tax was assessed against owners of large fleets of trucks operating in New York City who also furnished drivers for some of their vehicles. Appellant also cites certain cases defining "contract carrier" under Part II of the Interstate Commerce Act (49 U. S. C. 301 et seq) to support his contention that the truck owner-operators involved here were contract carriers.

Taking up first the facts in the *Bridge Auto Renting Corp.* case, *supra*, we find there that for many years plaintiff Metropolitan Distributors, Inc., had been engaged in the

business of renting trucks to mercantile concerns for use in delivering merchandise in New York City. It acquired plaintiff Bridge Auto Renting Corporation which was engaged in the same business. It also acquired plaintiff Bridge Leasing Corporation whose business was the furnishing of "a so-called pay roll service" under which it paid wages, pay roll taxes and compensation insurance of the drivers for such customers of Metropolitan as desired the service, being reimbursed periodically by such customers. All three companies were operated as a unit. Transportation taxes were assessed on the amounts received as truck rentals and also on the amounts received by Bridge Leasing as reimbursement for wages and pay roll taxes. No transportation taxes were imposed on amounts received by Metropolitan (on more than 90% of its business) where the pay roll service of Bridge Leasing was not used. Plaintiffs contended that the drivers on the pay roll of Bridge Leasing were not its employees but were employees of the lessees. Defendant contended that together the plaintiffs "were in substance furnishing a transportation service for hire because they are 'contract carriers'." The details of the long-term written agreements with the lessees are set out in full in the opinion.

The pay roll service was used (by less than 10% of the lessees) because the "lessee desired to be rid of the annoyance and work involved in preparing pay rolls and pay roll checks, arranging for the drivers to get their checks, and

attending to the various laws requiring pay roll deductions, or, if the drivers had been unionized or were about to become so, to avoid negotiating with the unions. . . . After an agreement was entered into, the drivers were taken off the pay roll of the lessee and placed on the pay roll of Metropolitan or Bridge Leasing."

Metropolitan kept records of the time worked by the various drivers and made out all of the necessary Social Security and income tax withholding returns. Such taxes were paid directly to the Collector of Internal Revenue by Metropolitan. "In making all of these returns Metropolitan or Bridge Leasing, as the case might be, described itself as the employer and the drivers as its employees." Certain lessees testified that the drivers were not considered by them to be their employees, and correspondence introduced in evidence indicated that Bridge Leasing had acknowledged itself to be the employer.

The lower court held that Metropolitan and the other plaintiffs were contract carriers because they retained control over the movement of the trucks. In affirming this decision, the Court of Appeals for the Second Circuit made no attempt to support the judgment by "tagging the appellant a contract carrier" but stated that the question was whether what it did added up to enough to be substantially what is done by a person hired and paid to transport property by truck. The court stated that the customers had only

to provide the goods for transport, direct the drivers where to take them, and pay the appellant for performing the transportation service. Considering all of these facts and circumstances, the appellate court upheld the findings and affirmed the judgment of the trial court. We feel that a comparison of the above facts in the Bridge Auto Renting Corp. case with the findings of fact and testimony in the instant cases will support our contention that they are factually dissimilar. The findings of fact made by the District Court in the Bridge Auto Renting Corporation case regarding the right to control were directly contrary to the findings of fact of the District Court in the cases at bar.

John J. Casale, Inc., supra, also was a corporation engaged in the business of owning and leasing trucks in New York City. For some of its customers it also furnished drivers under the terms of detailed long-term written contracts. To illustrate how the factual situation there was entirely different from the cases at bar, we quote from the opinion of the court:

"In cases where plaintiff furnished both trucks and drivers to customers, plaintiff selected and hired the drivers, contracted concerning the drivers' working conditions, hours, holidays, vacations, seniority, and rates of pay, with the various drivers' unions having jurisdiction, paid the drivers, and retained to itself the sole right to transfer or discharge them within the terms of its contract with the unions. The drivers were required to report at plaintiff's garages at the beginning of each working day and to return there with the

trucks to check out and park the trucks at the end of each day. Plaintiff's dispatchers at the beginning of each working day sent the trucks and drivers to destinations designated by the individual customers. During the working day the drivers operated under directions of the customers as to places to go and times to go, as to loading and unloading, identity and quantity of merchandise to be carried, whether to collect on delivery of merchandise, etc. The drivers were carried only on plaintiff's pay roll and the unions recognized only plaintiff as the employer of the drivers. Plaintiff was registered with the New York State Unemployment Office as the employer of the drivers. Plaintiff paid the drivers on time tickets prepared at plaintiff's garages and added the labor charges to the bills submitted to its customers for services. In addition to those charges, plaintiff billed its customers for the drivers' services an eight per cent over-all fee compensation for the drivers, unemployment compensation for the drivers' unemployment insurance, social security taxes, time clocks and time cards, the costs of making up pay rolls, issuing checks, office services, etc.

"The facts show that the drivers furnished to customers with plaintiff's trucks were plaintiff's employees and the custodians of its property while the trucks were in use on business of the customers. Plaintiff furnished all supplies and services requisite and necessary to the operation of the trucks. Plaintiff had the exclusive right, limited only by the terms of its contracts with the unions, to hire and discharge the drivers of the trucks, and it also had, at all times, the general right of direction and control of its trucks and drivers. . . ."

Although appellant made no such specific contention in the lower court (R. 11; 41-42; 71; 95), he now argues that the truck owner-operators were "contract carriers" as defined in the Regulations interpreting the transportation tax statute, citing several decisions under the Motor Carrier Act. (49 U. S. C. 301 et seq.) Those decisions involved the question as to whether a particular operation constituted the applicant a contract carrier or a private carrier as defined in Section 303 of Title 49, United States Code. As the court stated in the *Bridge Auto Renting Corp.* decision, *supra*, in referring to the Motor Carrier Act:

"While it is true that the purpose of that Act is different and so is the language, the problem is much the same in that it requires separating the essentially important features from the nonessentials and drawing a more or less arbitrary line between complex *fact* situations differing but slightly." (emphasis supplied.)

All of the cases cited by appellant upon this point stress the principle that control is the distinguishing feature. In *Motor Haulage Co., Inc., v. United States*, 46 M. C. C. 107, 70 F. Supp. 17, affirmed per curiam, 331 U. S. 784, cited by appellant, the District Court said at page 21 that "direct and complete control of the movement and handling of the freight is the test that should be applied," and in each and every other case cited by appellant on this point there is a specific finding of fact by the court that the applicant had complete control over the operation and thus qualified as a

contract carrier. The District Court in the cases at bar, on the other hand, made a specific finding of fact to the contrary. (R. 17; 48; 76.)

Passing to the second half of appellant's argument, we do not think that appellant seriously contends that a question of law rather than fact is presented in determining whether or not the employer-employee relationship existed (Appellant's Brief, p. 13), but he argues that the findings of fact of the trial court are "clearly erroneous" and thus subject to review by this court. He quotes language from the recent decision in *United States v. U. S. Gypsum Co., et al*, (1948), 333 U. S. 364, 68 S. Ct. 525, to the effect that a finding is "clearly erroneous" when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. This is merely another way of saying the same thing and cannot be interpreted as a new expression of the Supreme Court enlarging the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. Cf. *Graver Tank & Mfg. Co. v. Linde Air Products Co.* (1949), 69 S. Ct. 535, 537-8.

Appellant cites and quotes from the cases of *United States v. Silk* and *Harrison v. Greyvan Lines, Inc.*, *supra*, although the definition of "employee" in the Social Security Act was amended after those decisions were rendered. (Sections 1426(d) and 1607(i) of Title 26, United States Code.) In any event, we submit that the factual situations

in those cases were inapposite to the instant cases, and we have attached hereto as an appendix a detailed comparison of the factual situations.

On page 16 of his brief, appellant quotes from *Anglim v. Empire Star Mines Co.*, 129 F. (2d) 914, a decision of this court involving the application of the Social Security tax to an arrangement under which a mining company leased part of its mine to miners under the terms of a written contract. This court held that, under the facts presented, the miners were independent contractors. In comparing this arrangement with that in other parts of the mine which were worked by the company's employees, this court said, at page 916:

"Operations under these leases differed substantially from those of the taxpayer itself. The leasers had a free hand in determining where and in what manner to work their areas, how to sort the ore, what to discard as waste, etc. Taxpayer's only supervisory official to visit their work was the safety engineer who made periodic inspections in conformity with state laws. (In contrast with this, the taxpayer's operations were subject to the constant supervision of its shift bosses, foremen, superintendent, and its general manager.)"

A reading of the opinion in *Mutual Trucking Company v. United States*, 141 F. (2d) 655, relied upon by the appellant, will show that the company there engaged in interstate hauling entered into detailed written contracts with

certain truck owner-operators to haul freight at a flat rate per trip according to a printed schedule. The court said:

"Neither the drivers nor the owner-operators are under appellee's control with reference to the manner of their work. The important regulations which they observe grow out of and are imposed by the contract and the applicable (state) statutes and regulations. The drivers follow the routes required by the (public utility) commissions of the various states but with some deviation and in such case 'upon their own responsibility.'

"In this case concededly the owner-operators completely control payment of the wages."

Glenn v. Standard Oil Co., 148 F. (2d) 51, also cited by appellant, was a Social Security tax case involving the question as to whether certain commission agents operating bulk distributing plants were independent contractors or employees of the oil company. The appellate court restated the general rule that the determining factor is the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished, and sustained the findings of fact by the trial court that the company did not attempt to control the details and means by which the agents accomplished their result.

Boston Elevated Railway Co. v. Malley, 288 Fed. 864, cited by appellant, also declared control to be the determin-

ing factor. That case was decided under the Revenue Act of 1917, which differed from Section 3475 of the Internal Revenue Code in that it did not limit the tax to "amounts paid to a person engaged in the business of transporting property for hire." (40 Stat. 314.)

Finally, appellant says on page 15 of his brief that "most informative as to the correct result to be reached are the criteria of the employment relationship set forth in the Restatement of the Law, Agency, Section 220," and Subsection (2) of such section is contained in Appendix B to his brief. Subsection (1) of Section 220, however, is as follows:

"(1). A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control."

Control, or the right to control, is thus determined by applying the various subparagraphs of Subsection (2), or, as stated in the Comment found in the Restatement under this section:

"The factors stated in Subsection (2) are all considered in determining the question, and it is *for the triers of the fact to determine* whether or not there is a sufficient group of favorable factors to establish the relationship." (emphasis supplied.)

We submit that even the testimony of appellant's own witnesses supports the findings of fact made by the trial court. Witness L. M. Case testified that a representative

of the appellees directed him how to do his job. (R. 150.) Jack Becker, another of appellant's witnesses, testified as follows (R. 159-160):

"Q. Could the company have terminated your working on the job if they had wanted to?

"A. Yes.

"Q. On the job itself what right did the company have to tell you how to do the job?

"A. Well, it is their job. They just hire trucks and we take orders from them. We have to do as they tell us.

"Q. They would tell you where to spot the trucks for loading?

"A. Where to haul from and where to.

"Q. Where to haul from and where to and what routes to take?

"A. Yes."

Appellant's witness William M. Anderson, one of the truck owner-operators, twice stated flatly that he considered himself to be an employee of the appellees. (R. 165 and 167.)

Appellant has failed to point to any element of control which was not exercised by appellees in directing the truck drivers.

CONCLUSION

It is noteworthy that in the instant cases the appellant, or his predecessor in office, has collected the federal employment taxes and other Social Security taxes based upon the amounts paid by appellees to the truck drivers, whether they were truck owners or not. (They were also carried by appellees as employees under the Oregon Workmen's Compensation Act and Oregon Unemployment Compensation Act.) (R. 105.) The appellant has not refunded such employment taxes, despite the authority given him by Section 1421 of Title 26, United States Code, and if appellees were to file claims for refund of those taxes, they would no doubt be advised by the Commissioner of Internal Revenue that their claims were now barred by the applicable statute of limitations. Title 26, Section 3313, United States Code. The appellant, having elected to receive and retain the federal employment taxes, should not be permitted to also retain the transportation taxes assessed and collected by him on a theory entirely inconsistent with his previous position.

In view of the foregoing, we submit that the findings of the trial court are not "clearly erroneous" and that the judgments of the trial court are correct and should be affirmed.

Respectfully submitted,

CARL E. DAVIDSON,
CHARLES P. DUFFY.

APPENDIX

"The truckers are not instructed how to do their jobs, but are merely given a ticket telling them where the coal is to be delivered and whether the charge is to be collected or not."

"Any damage caused by them is paid for by the company."

"The truckers could and often did refuse to make a delivery without penalty."

"The company's instructions covered directions to the truckmen as to where and when to load freight. . . . The company maintained a staff of dispatchers who issued orders for the truckmen's movements, although not the routes to be used."

Truckmen required "to furnish all fire, theft and collision insurance which the (company) might specify to pay for all loss or damage to shipments and to indemnify the company." "Cargo insurance was carried by the company."

Required to haul freight tendered by the company.

Truck drivers were directed as to what, where, when, and how to haul; complete control of every detail by the company. (R. 128.)

Company carried liability insurance at its own expense. Truckers carried the amount of insurance required for their PUC licenses. (R. 109; 125.)

Required to haul as directed or face immediate discharge. (R. 128.)

APPENDIX—Continued

U. S. v. Silk	Harrison v. Greyvan Lines	Babler Bros.
<p>"The truckers may come and go as they please and frequently did leave the premises without permission."</p>	(See above.)	<p>Subject to detailed control by the company. (R. 159-160.)</p>
<p>"They may and did haul for others when they pleased."</p>	<p>"Truckmen were required to haul exclusively for the (company)."</p>	<p>Hauled exclusively for the company while on the payroll (R. 129.)</p>
<p>Sold coal at retail; delivered by truck.</p>	<p>Common carrier of household furniture by motor truck.</p>	<p>Construction of roads and airports. (R. 15; 46-47; 75.)</p>
<p>Silk "owns no trucks himself."</p>	<p>"The company had some trucks driven by truckmen who were admittedly company employees."</p>	<p>One of partners owned some trucks rented to company on same basis as others. (R. 135, 136.)</p>
<p>"contracts with workers who own their own trucks"</p>	<p>Written contracts with the truckmen who furnish their own trucks and all equipment and labor.</p>	<p>Oral agreements with truck owners. (R. 15; 46-47; 75.)</p>

APPENDIX—Continued

U. S. v. Silk	Harrison v. Greyvan Lines	Babler Bros.
<p>"deliver coal at a uniform price per ton"</p>	<p>"truckmen were to receive from the company a percentage of the tariff charged by the company."</p>	<p>Drivers paid union scale—hourly rate—whether owners or not. (R. 109.)</p>
<p>"paid to the trucker by the (company) out of the price he receives for the coal from the customer"</p>	<p>(See above.)</p>	<p>Paid in the same manner as all other employees—on regular payroll. (R. 143.)</p>
<p>"When an order for coal is taken in the company office, a bell is rung which rings in the building used by the truckers. The truckers have voluntarily adopted a call list upon which their names come up in turn, and the top man on the list has an opportunity to deliver the coal ordered."</p>	<p>"All contracts or bills of lading for the shipment of goods were to be between the (company) and the shipper. . . . If freight was tendered the truckmen, they were under obligation to notify the company so that it could complete the contract for shipment in its own name."</p>	<p>Drivers required to report for work each morning at a specified time and to work as directed by the company. (R. 142.)</p>

APPENDIX—Continued

U. S. v. Silk	Harrison v. Greyvan Lines	Babler Bros.
<p>"They pay all the expenses of operating their trucks, and furnish extra help necessary to the delivery of the coal and all equipment except the yard storage bins."</p>	<p>"furnish their own trucks and all equipment and labor necessary to pick up, handle and deliver shipments, to pay all expenses of operation." I.C.C. and other permits furnished by the company at its expense.</p>	<p>Furnished own trucks and some drivers. Some drivers employed by the company through union. All drivers carried on company payroll and paid by the company. (R. 140-143.)</p>
<p>"No record is kept of their time."</p>	<p>(Apparently) no record kept of their time.</p>	<p>Exact record kept of their time. (R. 140-143.)</p>
<p>"They are paid after each trip, at the end of the day or at the end of the week, as they request."</p>	<p>(Apparently) paid periodically a percentage of the tariff on freight hauled by them.</p>	<p>Paid periodically the same as all other employees of the company. (R. 140-143.)</p>
<p>Apparently not required to personally drive the trucks.</p>	<p>Required to personally drive their trucks.</p>	<p>Not required to personally drive trucks. (R. 127.)</p>
<p>Oral contract apparently terminable at any time by either party.</p>	<p>Written "contract was terminable at any time by either party."</p>	<p>Oral contract terminable at any time by either party. (R. 161.)</p>

No. 12320

United States
Court of Appeals
For the Ninth Circuit.

JAMES G. SMYTH, Collector of Internal Revenue,
for the First District of California,
Appellant,

vs.

MURIEL E. BARNESON, also known as Muriel
Elfrida Barneson, an Incompetent Person, by
Lionel T. Barneson, Guardian,
Appellee.

Transcript of Record

Appeal from the District Court of the United States
for the Northern District of California,
Southern Division.

FILED

OCT 28 1949

PAUL P. O'BRIEN,
CLERK

No. 12320

**United States
Court of Appeals**
For the Ninth Circuit.

JAMES G. SMYTH, Collector of Internal Revenue,
for the First District of California,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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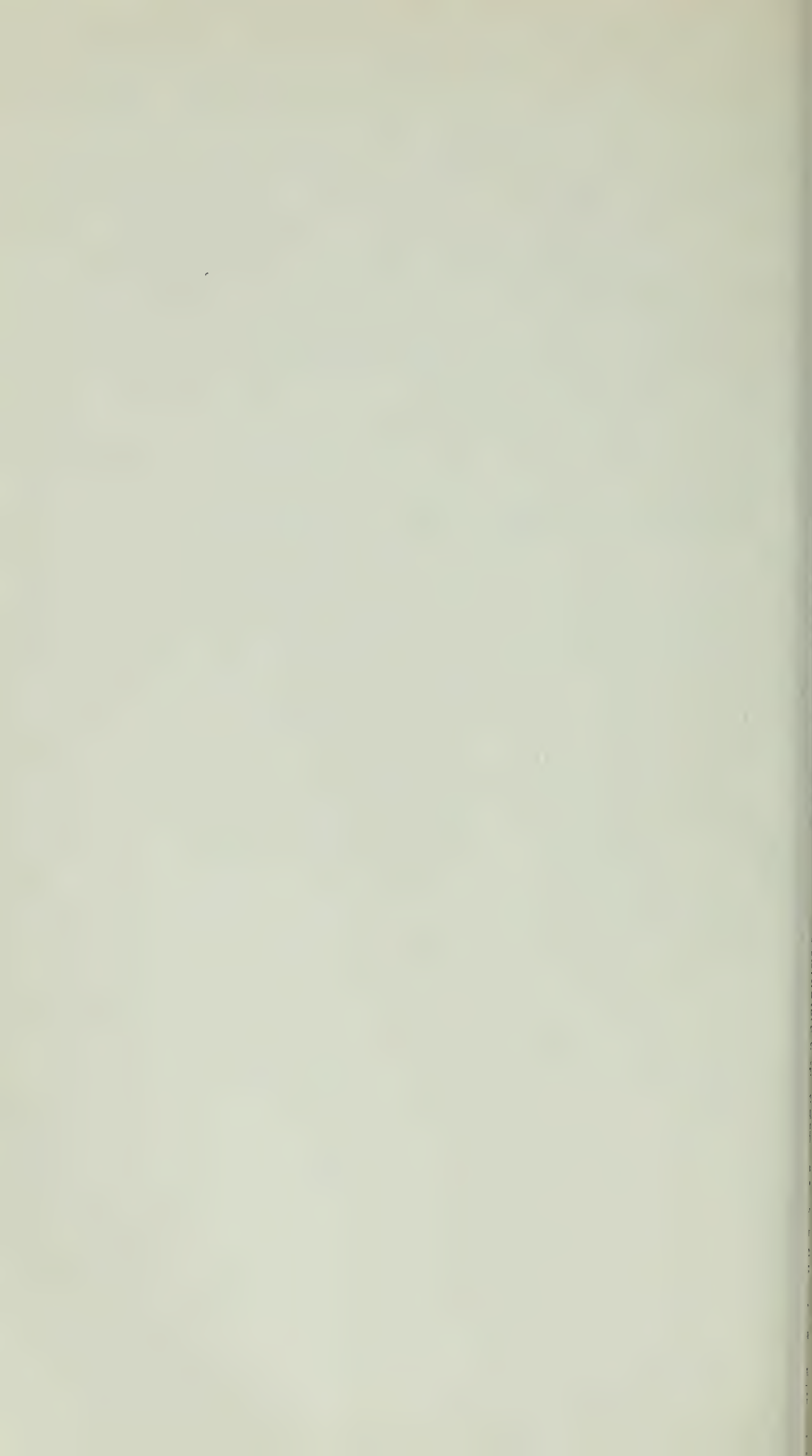
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NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,

United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California.

Attorney for Defendant and Appellant.

BRADY & NOSSAMAN,

433 South Spring Street,
Los Angeles, California.

Attorneys for Plaintiff and Appellee.

Trial before the Honorable Louis E. Goodman,
District Judge, sitting without a jury.

In the District Court of the United States, in and
for the Northern District of California, South-
ern Division

Civil Action File No. 27929G

MURIEL E. BARNESON, also known as Muriel
Elfrida Barneson, An Incompetent Person, by
Lionel T. Barneson, Guardian,
Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue
for the First District of California,
Defendant.

COMPLAINT
(To Recover Income Taxes)

Plaintiff herein for cause of action against the
defendant alleges:

1. Lionel T. Barneson is the duly appointed,
qualified and acting guardian of the person and
estate of Muriel E. Barneson, also known as Muriel
Elfrida Barneson, an incompetent person, plaintiff
herein. A certified copy of Letters of Guardianship
is attached hereto as Exhibit "A".

2. At all times hereinafter mentioned, plaintiff,
Muriel E. Barneson, and the guardian of her person
and estate, Lionel T. Barneson, were, and still are,
citizens of the United States, domiciled in the State
of California.

3. Defendant is, and at all times since May 14,

1945, has been, the duly appointed and acting Collector of Internal Revenue for the First District of California.

4. On May 8, 1928, plaintiff loaned John Barneson, her father, the sum of \$100,000.00 in cash, and on May 15, 1929, plaintiff loaned said John Barneson the further sum of \$50,000.00 in cash. Plaintiff did not keep any books of account, either at the times of the aforesaid loans or at any later time. John Barneson, at all material times, kept books of account. The aforesaid loans were recorded on John Barneson's books of account by credit entries in an account entitled, "Muriel E. Barneson. Loan a/c." No debit entries were ever made in said account.

5. John Barneson died February 25, 1941, and his estate was probated in the Superior Court of the State of California in and for the County of San Mateo, Case No. 9360 in the files of said court. On the date of his death said John Barneson was indebted to plaintiff for the monies loaned to him on May 8, 1928, and May 15, 1929, as alleged in paragraph 4 above, and the aforesaid account entitled, "Muriel E. Barneson. Loan a/c," showed a credit balance of \$150,000.00 on said date of death.

6. At all times material hereto the aforesaid John Barneson was an individual of large financial wealth and possessed the requisite financial ability to have paid his aforesaid indebtedness to plaintiff in full on demand. Plaintiff, however, was at all

material times a person of even larger financial resources than said John Barneson. Plaintiff never made demand on her father for repayment but at all times expected eventual repayment of the aforesaid indebtedness and never forgave or cancelled the same or any part thereof. John Barneson expected that plaintiff would eventually be repaid said indebtedness either by him during his lifetime or, if not, then by his estate. At all material times the estate of John Barneson was of such size and composition that the debt of said John Barneson to plaintiff could have been readily paid in full; the Commissioner of Internal Revenue, in his final determination of estate tax liability of the estate of John Barneson, determined that the net estate for the "additional tax" was \$629,018.82 and that the "net tax payable and defense tax" was in the amount of \$113,722.55.

7. Following the death of said John Barneson, and within the time provided by law for the filing of claims against his estate, plaintiff, acting through the guardian of her person and estate, presented her written and verified claim for the indebtedness resulting from plaintiff's loans to said John Barneson of \$100,000.00 on May 8, 1928 and \$50,000.00 on May 15, 1929. The collection of said indebtedness was barred by the applicable statute of limitations prior to and at the instant of said John Barneson's death, and said claim therefor was, solely for that reason, rejected by Honorable A. R. Cotton, Judge of the Superior Court of the

State of California in and for the County of San Mateo on June 23, 1941. The plaintiff did not bring suit on said claim within three months after June 23, 1941, or at any time thereafter.

8. The aforesaid indebtedness of John Barneson to plaintiff in the amount of \$150,000.00 did not become worthless prior to January 1, 1941, the beginning of the taxable year of plaintiff here involved, but, on the contrary, said indebtedness had a value equal to its face value at all times between the dates in 1928 and 1929 when plaintiff made the loans to John Barneson and the instant immediately preceding the instant of his death on February 25, 1941. Said indebtedness became utterly worthless within the taxable year, solely by reason of the death of said John Barneson and rejection of the claim by the probate court in that year, and plaintiff was entitled to claim a deduction therefor in her income tax return for the calendar year 1941 under the authority of Section 23(k)(1) of the Internal Revenue Code as amended by Section 124 of the Revenue Act of 1942.

9. On or before March 15, 1942, plaintiff filed with the then Collector of Internal Revenue for the First District of California, her federal income tax return for the calendar year 1941 on Form 1040 of the Treasury Department Internal Revenue Service. Said return showed the following items of gross income and deductions therefrom:

INCOME

2. Dividends	\$102,525.45
3. Interest on bank deposits, notes, etc.	382.47
5. Rents and royalties	15,708.47
7. (b) Net long-term loss from sale or exchange of capital assets....	423.15
8. Income from partnerships; fidu- ciary income; and other income....	14,191.23
10. Total income in items 1 to 9.....	\$132,875.26

DEDUCTIONS

12. Interest	220.68
13. Taxes	12,510.62
15. Bad debts	150,000.00
16. Other deductions authorized by law	45.11
17. Total deductions in items 11 to 16.....	\$162,776.41
18. Net income (item 10 minus item 17).....	.00

10. Among the deductions aggregating \$162,776.41, as alleged in paragraph 9 above, was item 15—bad debts—in the amount of \$150,000.00. The basis on which plaintiff took said deduction of \$150,000.00 was described in a written statement attached to said return as filed, which statement was subscribed and sworn to before a Notary Public, by Lionel T. Barneson, as plaintiff's guardian. The body of said statement reads as follows:

“This is a statement with reference to bad debt reduction of \$150,000 claimed as Item 15 on the Federal Return and as Item 16 on the California return.

“In 1928 and 1929, the taxpayer loaned to her father, John Barneson, the aggregate sum of \$150,000 in cash. At or about the same time, taxpayer's mother, Harriet E. Barneson, also loaned a like amount in cash to John Barneson.

“John Barneson died February 25, 1941. His estate is now in process of probate in the Superior Court of the State of California in and for the County of San Mateo, No. 9360 in the files of said court.

“This debt of \$150,000 was, on the date of John Barneson’s death, and at all other times since it was incurred, evidenced by a loan account on his books of account; taxpayer, Muriel Barneson, has never kept books of account.

“Following the death of John Barneson, and within the time provided by law for the filing of claims against his estate, the taxpayer, acting through her guardian, presented her written and verified claim for said debt of \$150,000. On June 23, 1941, Hon. A. R. Cotton, Judge of the Superior Court, rejected said claim. The ground or basis of rejection was that it was barred by the statute of limitations. Taxpayer’s guardian was informed of such rejection on the date thereof, or at least within a few days thereafter, and thereupon made a mental ‘charge off’ of the debt, and determined to take a deduction therefor, as for a bad debt, on the income tax returns of his ward for the calendar year 1941. (Said guardian is also Executor of the Estate of John Barneson.) See attached affidavit of Martin Weil, attorney for Estate of John Barneson.

“The debtor, John Barneson, at all times possessed the requisite financial ability to pay this debt and likewise the \$150,000 borrowed from taxpayer’s

mother. Nevertheless, in order to have done so, it would have been necessary for him to sell securities at what for many years during the depression seemed like less than true or fair values. This would also have had the effect of reducing substantially John Barneson's future income, which was not in excess of his expenses, which were very large. Consequently, neither the taxpayer nor her mother, who died April 14, 1936, ever pressed John Barneson for payment; each of them had far more than ample income for current needs, and no inconvenience resulted from the delay of John Barneson in repaying. Nevertheless, there was never any intention on the part of either creditor to forgive the indebtedness or any part thereof. Nor would John Barneson ever have accepted a forgiveness of the debts. This is shown by the fact that subsequent to the death of his wife, John Barneson, on April 27, 1937, discharged his debt of \$150,000 to her estate in full, notwithstanding the debt was barred by the applicable California statute of limitations. Said obligation of \$150,000 was reported at its full face value as Item 5 on Schedule F of Form 706 filed by the Estate of Harriet E. Barneson, on which the total federal estate tax liability, as later determined by the Board of Tax Appeals, was \$665,609.19. It is obvious that if John Barneson had desired to invoke the statute of limitations as a defense against collection by the Estate of Harriet E. Barneson of the indebtedness of \$150,000 to Harriet E. Barneson (indebtedness of like

amount to that which he owed Muriel Barneson and incurred at the same time and for similar reasons), a very large reduction in the federal estate tax liability of the Estate of Harriet E. Barneson could have been effected.

“The writer (Lionel T. Barneson) was in very close contact with John Barneson, especially during the latter years of his life, and knows that if John Barneson had thought for one moment that his debt to Muriel Barneson would not be paid to her by his estate, he would have paid it during his lifetime, as he could have done by selling, or transferring to Muriel, securities of a value of \$150,000.

“The writer is advised by counsel that because the debt to Muriel Barneson cannot be paid, it is not deductible in determining the net estate of John Barneson for federal estate tax purposes. See *Estate of Pryor Brown, deceased, v. United States*, Court of Claims, March 3, 1941, CCH Inheritance, Estate and Gift Tax Service (Federal), paragraph 10,035 and 1941 Prentice-Hall, paragraph 62,499. The result is that a large estate tax is payable on this \$150,000—on the ‘top’ of John Barneson’s estate—whereas at any time prior to his death John Barneson could have paid the debt without any tax liability of any kind, either to himself or to Muriel Barneson.

“The writer is also advised, however, that Muriel Barneson is entitled to a bad debt deduction of \$150,000 under the doctrine of the Circuit Court of Appeals for the Ninth Circuit in *Commissioner*

v. Burdette, 69 F.(2d) 410, 13 AFTR 702 (1934), which likewise involved a California debtor.”

The affidavit of Martin Weil, referred to in the fifth paragraph of the statement of Lionel T. Barneson, quoted above (see page 6, line 3 above) reads as follows:

“I am a member of the State Bar of California and am engaged in the active practice of law with offices in the Higgins Building, Los Angeles, California. I am the attorney for the Estate of John Barneson, who died February 25, 1941, and whose estate is now in process of probate in the Superior Court of the State of California, in and for the County of San Mateo, No. 9360 in the files of said court. Lionel T. Barneson, 256 Montgomery Street, San Francisco, is the executor.

“Prior to June 23, 1941, it came to my attention that the decedent was, at the date of his death, indebted, as shown by his books of account, in the amount of \$150,000.00 to his daughter, Muriel Barneson, for loans made in cash on May 8, 1928, in the amount of \$100,000.00, and on May 15, 1929, in the amount of \$50,000. Lionel T. Barneson is also guardian of the person and estate of the afore-said Muriel Barneson, an Incompetent Person, and as such fiduciary, prepared a creditor's claim against the Estate of John Barneson, in the amount of \$150,000.00 As attorney for said estate, I deemed it my duty to bring to the attention of the probate court (Honorable A. R. Cotton, Judge) the fact that in my opinion the payment of said

claim was barred by the statute of limitations. I did this in chambers on June 23, 1941, and thereupon Judge Cotton rejected the claim by an endorsement to that effect thereon.

“The purpose of this affidavit is to state that I know of my own knowledge that the ground of rejection was the statute of limitations, and no other.”

Aside from the deduction of said \$150,000.00 as a bad debt in her return for the calendar year 1941, plaintiff has never claimed any deduction with respect to the whole or any part thereof in any other taxable year; nor has the Commissioner ever allowed any deduction in any taxable year with respect thereto.

11. Plaintiff's income tax return for the calendar year 1941 was in due course examined by an Examining Officer acting under F. M. Harless, Internal Revenue Agent in Charge at San Francisco, California. Said Examining Officer made a report asserting a deficiency of \$70,388.20 in plaintiff's income tax for the calendar year 1941. Plaintiff thereafter duly filed a written and verified protest against said asserted deficiency and conference was had between representatives of the plaintiff and a member of the Conference Section of the Office of the Internal Revenue Agent in Charge at San Francisco. Subsequently, the Commissioner of Internal Revenue (hereinafter referred to as the Commissioner), acting by and through the aforesaid F. M. Harless, Internal Revenue Agent in Charge, mailed

to the plaintiff notice of his final determination of plaintiff's federal income tax liability for the calendar year 1941, which notice was dated June 25, 1945, and asserted a deficiency of \$70,369.97. Said asserted deficiency was based upon six adjustments, which were set forth in the statement attached to the aforesaid final notice of deficiency as follows:

“ADJUSTMENTS TO NET INCOME”

“Net income (loss) disclosed by return.....		\$ (29,901.15)
Unallowable deductions and additional income:		
(a) Bad debt	\$150,000.00	
(b) Rents and royalties.....	4,441.11	
(c) Long-term capital gain.....	585.43	
(d) Fiduciary income	2,745.17	
(e) Dividends	31.99	157,803.70
Total		<hr/> \$127,902.55
Nontaxable income and additional deductions:		
(f) Guardianship fees		3,000.00
Net income adjusted		<hr/> \$124,902.55”

Plaintiff does not contest the correctness of the Commissioner's adjustments (c), (e) and (f) above but does challenge adjustment (a) in its entirety and adjustments (b) and (d) in part.

12. The increase of \$2,745.17 made by the Commissioner in plaintiff's fiduciary income—adjustment (d) in paragraph 11 above—resulted in part from increases made by the Commissioner in the net income of the testamentary trust created by the will of plaintiff's mother, Harriet E. Barneson, who died April 14, 1936, and in which net income plaintiff's distributive share was 25%. The Commissioner determined that the correct amount of

net income of said testamentary trust distributable to its beneficiaries was \$63,511.22 and that plaintiff's share thereof was \$15,877.80. In determining said net income of \$63,511.22 the Commissioner disallowed as a deduction interest paid by the trustee of said testamentary trust during the calendar year 1941 in the amount of \$6,311.68, said disallowance being explained in the statement which accompanied the Commissioner's final notice of deficiency dated June 25, 1945 (see paragraph 11 above), as follows:

“(A) Deduction of \$6,311.68 claimed for interest paid by the trust during the taxable year on additional federal estate taxes and state inheritance taxes assessed against the estate of Harriet E. Barneson, deceased, is disallowed. Since the additional estate and inheritance taxes were not a direct liability of the trust, it is held that the interest on such additional taxes, paid by the trustee as transferee of assets of the estate, does not constitute an allowable deduction to the trust for income tax purposes.”

At all material times the books of account of said testamentary trust were kept, and its fiduciary income tax returns were made, on the basis of cash receipts and disbursements, and plaintiff's income tax return for the calendar year 1941 was filed on that basis. The Commissioner, in determining the asserted deficiency of \$70,369.97, also used the cash basis. The item of interest of \$6,311.68 referred to above is made up as follows:

(a) On or shortly after July 15, 1941, the trustee paid an additional federal estate tax of \$19,856.62, together with interest thereon in the amount of \$4,765.59 (calculated from July 14, 1937, the date on which interest commenced to run, to July 14, 1941). \$271.37 was allocated to the period between July 14, 1937, and October 4, 1937, the date of the decree of distribution, and the remainder, \$4,494.22, was allocated to the period from October 5, 1937, to July 14, 1941.

(b) On August 27, 1941, the trustee made a further payment of federal estate tax in the amount of \$1,466.48, together with interest in the amount of \$362.47, covering the period from July 14, 1937, to August 27, 1941. \$20.04 was allocated to the period from July 14, 1937, to October 4, 1937, and \$342.43 to the period commencing with the date of the decree of distribution.

(c) On September 22, 1941, the trustee paid an additional California inheritance tax of \$4,620.59, together with interest of \$1,116.77 thereon for the period from April 14, 1938, to the date of payment.

(d) On or about July 2, 1941, the trustee paid an additional California income tax of the decedent for the period January 1, 1936, to April 14, 1936, the date of death, together with interest of \$66.85 covering the period from April 15, 1937, to July 2, 1941.

Out of the total interest payments made by the testamentary trust during the calendar year 1941, namely, \$6,311.68, the portion which accrued after

October 4, 1937, the date of the decree of distribution, was \$6,016.88, and said amount was properly deductible, as interest paid on indebtedness, in determining the net income of said trust for the calendar year 1941 and in determining the net income distributable to beneficiaries. If said amount of \$6,016.88 had been allowed as a deduction in determining the net income and distributable net income of said trust, the amount by which plaintiff's income from fiduciaries would have been increased by the Commissioner would have been \$1,240.85 instead of \$2,745.17. The correct amount of plaintiff's income from fiduciaries was \$15,432.48 (\$14,191.23, as reported in plaintiff's return, plus \$1,240.85).

13. Plaintiff, in her return for the taxable year 1941, reported income from rents and royalties in the amount of \$15,708.47 (Item 5 of Form 1040; paragraph 9 above), and explained how she arrived at said amount of \$15,708.47 in a detailed schedule of receipts and deductions attached to said return. The Commissioner, in his final determination, increased said income from rents and royalties in the amount of \$4,441.11, said increase (insofar as plaintiff alleges it to be erroneous) being explained in the statement which accompanied the final notice of deficiency dated June 25, 1945 (see paragraph 11 above) as follows:

“(b) Deductions claimed in connection with rental income and royalties are decreased by \$4,441.11 as follows:

(1) Taxes disallowed	\$ 833.26
(2) Social security taxes, penalties and interest thereon disallowed.....	1,324.11
(3) Depreciation on rental properties de- creased	1,706.92
(4) Depreciation on oil lease properties decreased	576.82

Total decrease in deductions....\$4,441.11

“(1) Muriel E. Barneson acquired an undivided 1/6 interest in certain real properties and a Union Pacific oil lease when the real properties and the lease were distributed to her and other members of the Barneson family as tenants in common by the Oakburn Corporation upon its dissolution in 1938.

“Subsequent thereto Muriel E. Barneson acquired a life interest in an additional 1/6 share in the aforementioned real properties and oil lease under the terms of the will of John Barneson who died 25 February 1941.

“Taxes claimed as applicable to the 1/6 share of the real properties and the oil lease held in life tenancy are decreased by \$833.26 as follows:

	Claimed	Adjusted	Decrease
For fiscal year ended			
30 June 1940.....	\$ 510.22	\$ None	\$510.22
For fiscal year ended			
30 June 1941.....	697.21	None	697.21
For fiscal year ended			
30 June 1942.....	2,064.56	2,438.73	(374.17)
Totals	\$3,271.99	\$2,438.73	\$833.26

“Taxes for the fiscal years ended 30 June 1940

and 30 June 1941 assessed against the portion of the real properties and the oil lease held in life tenancy are disallowed since such taxes accrued prior to the death of John Barneson and do not, therefore, represent the liability of Muriel E. Barneson. Taxes for the fiscal year ended 30 June 1942 are allowed in full since they accrued subsequent to the death of Mr. Barneson."

The Commissioner's purported factual determination that "Subsequent thereto Muriel E. Barneson acquired a life interest in an additional 1/6 share in the aforementioned real properties and oil lease under the terms of the will of John Barneson who died 25 February 1941" is not true; said life interest in said properties was acquired by plaintiff under the will of her mother, Harriet E. Barneson, who died April 14, 1936. The taxes on said properties for the fiscal years ended June 30, 1940 and June 30, 1941, in the amounts of \$510.22 and \$697.21, respectively, represented the tax liabilities of plaintiff.

14. On June 28, 1945, plaintiff paid to defendant, as Collector of Internal Revenue for the First District of California, the sum of \$70,369.97, as federal income tax asserted by the Commissioner to be owing by plaintiff for the calendar year 1941. At the time said payment was made to the defendant, however, said defendant was given written notice that plaintiff contended that she had no income tax liability whatever for the calendar year 1941; that the amount of said asserted tax, to wit,

\$70,369.97, and any interest thereon which might subsequently be paid by plaintiff, were paid under protest; and that plaintiff reserved all rights to file a claim for refund for the entire amount paid and in the event said claim was rejected, in whole or part, to bring suit to recover against said defendant or the United States, as the plaintiff might later be advised. Defendant acknowledged receipt of said written protest on June 28, 1945. Subsequently, defendant issued a notice and demand on plaintiff for the payment of interest in the amount of \$13,872.52 on the aforesaid asserted tax deficiency of \$70,369.97, and, pursuant to said demand, plaintiff paid to the defendant, as interest, asserted by defendant to be due from plaintiff, the sum of \$13,872.52 on or about October 23, 1945.

15. Within the time and in the manner provided by law, plaintiff filed with defendant on Form 843 of the Treasury Department Internal Revenue Service, a claim for refund, duly executed and verified, in which plaintiff demanded a refund of the sum of \$70,369.97 tax paid by her on June 28, 1945, and of the sum of \$13,872.52 interest paid by her on or about October 23, 1945, as alleged in paragraph 14 above. Said claim for refund set forth, as grounds thereof, the facts hereinabove alleged with respect to the aforesaid bad debt of \$150,000.00, with respect to income from fiduciaries, and with respect to income from rents and royalties.

16. More than six months have expired since the filing of said claim for refund. The Commissioner has failed to render a decision on said claim.

17. The failure to allow said claim for refund, as above described, was erroneous and contrary to the provisions of the Internal Revenue Code.

18. There is now owing from defendant to plaintiff the sum of \$84,242.49 (tax of \$70,369.97 and interest of \$13,872.52) unrefunded overpayment of tax and interest, with interest on said sum as provided by law.

19. This is a suit of a civil nature at common law which arises under the Constitution and laws of the United States and under the laws of the United States providing for internal revenue.

Wherefore, plaintiff prays judgment against defendant in the sum of \$84,242.49 for said taxes and interest erroneously and illegally collected and not refunded, together with interest as provided by law, the costs of this suit, and for such other and further relief as may be just and proper in the premises.

BRADY & NOSSAMAN,

By /s/ JOSEPH D. BRADY,
/s/ WALTER L. NOSSAMAN,
/s/ JOHN O. PAULSTON,
/s/ JAMES L. WOOD,

Attorneys for Plaintiff.

EXHIBIT A

In the Superior Court of the State of California,
In and For the County of Ventura

No. 19341

LETTERS OF GUARDIANSHIP

In the Matter of the Estate and Guardianship of
MURIEL ELFRIDA BARNESON, an in-
competent person.

State of California,
County of Ventura—ss.

Lionel T. Barneson is hereby appointed guardian
of the person and estate of Muriel Elfrida Barne-
son an incompetent person.

Witness: L. E. Hallowell, Clerk of the Superior
Court of the County of Ventura, with the seal
of the Court affixed, the 3rd day of April 1936.

L. E. HALLOWELL

Clerk

[Seal] By J. G. HATHAWAY

Deputy Clerk

State of California,
County of Ventura—ss.

I do solemnly swear that I will support the Con-
stitution of the United States and the Constitution
of the State of California, and that I will faithfully
perform the duties of my office as Guardian of the

person and estate of Muriel Elfrida Barneson, an incompetent person, according to law.

LIONEL T. BARNESON

Subscribed and sworn to before me this 3rd day of April 1936

[Seal] CHAS. F. BLACKSTOCK,

Notary Public in and for said county and state.
State of California,
County of Ventura—ss.

I, L. E. Hallowell, County Clerk of the County of Ventura, State of California, and ex-officio Clerk of the Superior Court in and for said county, hereby certify that the within and foregoing is a full, true and correct copy of Letters of Guardianship issued in the therein entitled matter, as the same remain of record and on file in my office. I further certify that said Letters have not been revoked, but are still in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 19th day of February 1948.

L. E. HALLOWELL

County Clerk

[Seal] By /s/ IRENE VAN FOSSEN

Deputy Clerk

[Endorsed]: Filed Superior Court April 3, 1936.

State of California,
County of Los Angeles—ss.

Lionel T. Barneson, as Guardian of the Person and Estate of Muriel E. Barneson, also known as Muriel Elfrida Barneson, An Incompetent Person,

being by me first duly sworn, deposes and says: that he is the Plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ LIONEL T. BARNESON,

As Guardian of the Person and Estate of Muriel E. Barneson, also known as Muriel Elfrida Barneson, An Incompetent Person.

Subscribed and sworn to before me this 18th day of February, 1948.

[Seal] /s/ JULIA M. FITZSIMMONS,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Feb. 17, 1952.

[Endorsed]: Filed U.S.D.C. Feb. 25, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now James G. Smyth, Collector of Internal Revenue for the First District of California, defendant herein, by his attorney, Frank J. Hennessy, United States Attorney in and for the Northern District of California, for his answer to the complaint of the plaintiff, admits, denies and alleges as follows:

I.

The allegations contained in paragraphs 1, 2 and 3 of the complaint are admitted.

II.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 4 of the complaint.

III.

The allegations contained in paragraph 5 of the complaint are denied, except it is admitted that John Barneson died February 25, 1941, and his estate was probated in the Superior Court of the State of California in and for the County of San Mateo, Case No. 9360 in the files of said court.

IV.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 6 of the complaint.

V.

The allegations contained in paragraph 7 of the complaint are denied, except it is admitted that upon the death of the said John Barneson plaintiff filed a claim against his estate for an alleged indebtedness resulting from purported loans from plaintiff to said John Barneson of \$100,000 on May 8, 1928, and \$50,000 on May 15, 1929, and except that the said purported claim was rejected by the Honorable H. R. Cotton, Judge of the Superior Court of the State of California, in and for the County of San Mateo on June 23, 1941; and that plaintiff had not and did not bring suit on said claim.

VI.

The allegations contained in paragraph 8 of the complaint are denied.

VII.

The allegations contained in paragraph 9 of the complaint are admitted; for further answer to said paragraph 9 defendant denies that the return of income as filed contained a correct statement of plaintiff's income and deductions for the year 1941.

VIII.

The allegations contained in paragraph 10 of the complaint are denied, except it is admitted that in her income tax return as filed for the year 1941 as item 15, plaintiff took and claimed as a deduction the amount of \$150,000 and it is further admitted that there was attached to said return, as filed, a written statement in which plaintiff purported to justify the \$150,000 as a bad debt deduction; and except it is further admitted that plaintiff has not claimed or the Commissioner of Internal Revenue allowed any part of said claimed \$150,000 in any other year.

IX.

The allegations contained in paragraph 11 of the complaint are admitted.

X.

The allegations contained in paragraphs 12 and 13 of the complaint are denied.

XI.

The allegations contained in paragraph 14 of the

complaint are denied, except it is admitted that plaintiff paid to the defendant on July 28, 1945, and not June 28, 1945, as alleged, the sum of \$70,369.97, federal income tax determined by the Commissioner of Internal Revenue to be due and owing by her for said year 1941; that a further payment of interest in the amount of \$13,872.32 on the afore-said deficiency was made on October 18, 1945, and not October 25, 1945, as alleged.

XII.

The allegations contained in paragraph 15 of the complaint are denied, except it is admitted that plaintiff filed with the defendant on Form 843, a claim for refund of \$70,369.97 tax, and \$13,872.52 interest, all within the time and manner provided by law.

XIII.

The allegations of paragraphs 16 and 19 of the complaint are admitted.

XIV.

The allegations of paragraphs 17 and 18 of the complaint are denied.

Wherefore, having fully answered, defendant prays that defendant's suit be dismissed, for his costs and all other proper relief.

/s/ FRANK J. HENNESSY,
U. S. Attorney,
Attorney for the Defendant.

/s/ WILLIAM E. LICKING,
Asst. U. S. Atty.

[Endorsed]: Filed May 11, 1948.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following facts may be taken as true for the purposes of this case, subject to the right of either party to introduce other or further evidence not inconsistent therewith and subject further to the right of either party to object thereto on any ground other than the mode of proof:

1. Lionel T. Barneson is, and at all times since April 3, 1936, has been, the duly appointed, qualified and acting guardian of the person and estate of Muriel E. Barneson, also known as Muriel Elfrida Barneson, an incompetent person, plaintiff herein. Plaintiff is the daughter of John Barneson, who was born in 1862 and died February 25, 1941, and Harriet E. Barneson, his wife, who died April 14, 1936. John and Harriet had three other children, J. Leslie Barneson and Lionel T. Barneson, who are still living, and Harold J. Barneson, who died February 7, 1945. Throughout the entire period of time between the years 1928 and 1941, both inclusive, plaintiff was a person of great wealth. Said wealth was derived originally from gifts to plaintiff from her father and her mother. At all times material hereto, John, Harriet and Muriel Barneson were residents of, and domiciled in, the State of California.

2. At all times hereinafter mentioned, plaintiff Muriel E. Barneson, and the guardian of her person and estate, Lionel T. Barneson, were, and still are, citizens of the United States, domiciled in the State of California.

3. Defendant is, and at all times since May 14, 1945, has been, the duly appointed and acting Collector of Internal Revenue for the First District of California.

4. Prior to July 1, 1927, Harold J. Barneson carried on a general stock and bond brokerage business in copartnership with one Clarence S. Streeter. Said copartnership was dissolved as of July 1, 1927, said Barneson acquiring by purchase all of the interest of said Streeter in the said partnership property. Under date of February 9, 1928, Harold J. Barneson (as H. J. Barneson) entered into a written agreement of copartnership with James D. Kennedy of Los Angeles and C. R. Stevens of San Francisco under which said parties became, effective as of July 1, 1927, copartners in the stock and bond brokerage business in the cities of Los Angeles and San Francisco under the name and style of "H. J. Barneson & Co." H. J. Barneson contributed to the partnership certain exchange memberships of an agreed value of \$319,200.00, together with other property of an agreed value of \$109,843.85, and agreed to contribute in addition the sum of \$270,956.15 out of profits. Kennedy and Stevens each agreed to contribute \$150,000.00 out of profits. Said copartnership agreement provided that net

profits should be divided 70% to H. J. Barneson, 15% to Kennedy, and 15% to Stevens. On November 1, 1928, H. de La Chapelle was added to the partnership. Stevens and La Chapelle retired from the partnership as of December 31, 1929, and effective January 1, 1930, a new partnership under the name of H. J. Barneson & Co. was formed, consisting of H. J. Barneson, James D. Kennedy, J. Leslie Barneson and M. Eyre Pinckard, as general partners, and John Barneson, as limited partner. Subsequently, in December, 1930, the firms of H. J. Barneson & Co. and Walsh, O'Connor & Co. consolidated their brokerage business in a new partnership. The general partners were Kenneth Walsh, George R. O'Connor, Cliff M. Weatherwax, Arthur N. Earll, R. M. Marshall, Eric L. Pedley, H. J. Barneson, J. Leslie Barneson and James D. Kennedy. The limited partners were Edward M. Walsh and John Barneson. The firm of Walsh, O'Connor & Barneson discontinued business on February 20, 1932, and was liquidated. See 38 B.T.A. at 371.

5. In October, 1927, Harold J. Barneson needed to borrow money with which to conduct his stock brokerage business. In that month, in order to obtain collateral upon which he could borrow money from the banks, Harold borrowed 5,000 shares of Standard Oil Company of New York from his father, John Barneson, and 5,000 shares of Standard Oil Company of New York from the Oakburn Company, a holding company one-sixth of the stock of which was owned by each of the six members of

the Barneson family. The need for additional working capital increasing still further, Harold Barneson, in the months of April and May, 1928, asked for and received from John Barneson cash in the aggregate sum of \$300,000.00, of which sum John Barneson obtained \$100,000.00 from his wife, Harriet E. Barneson, and \$100,000.00 from his daughter, Muriel. In 1929, Harold desired additional sums of money and John Barneson, in the months of May and July, 1929, supplied Harold with an aggregate of \$125,000.00, of which John Barneson obtained \$50,000.00 from Muriel in May, and \$50,000.00 from Harriet in July. Of the total of cash funds transferred by John Barneson to Harold in 1928 and 1929 (\$300,000.00 in 1928 and \$125,000.00 in 1929) \$150,000.00 was supplied by Harriet, \$150,000.00 by Muriel, and the remaining balance came from moneys which were theretofore the property of John Barneson. Harold Barneson's understanding of his obligations with respect to the aforesaid \$425,000.00 was stated in a letter dated December 5, 1929, which he wrote his father on the letterhead of H. J. Barneson & Co. and which is reproduced below:

“Captain John Barneson,
Summerholme,
Burlingame, California.

Dear Dad:

This is to acknowledge that, in addition to \$100,000 received from you April 12th, 1928, and \$200,-

000 received from you May 9th, 1928, on which total of \$300,000 I have previously agreed to pay you $7\frac{1}{2}\%$ of the net profits of H. J. Barneson & Company, a co-partnership, I also received the following:

On May 31st, 1929.....	\$50,000.00
On July 15th, 1929.....	25,000.00
On July 24th, 1929.....	50,000.00
	<hr/>
	\$125,000.00

On this total of \$125,000.00 I agree to pay $3\frac{1}{8}\%$ of the net profits of H. J. Barneson & Company. This is the same ratio as the payment on the \$300,000 above referred to and makes a total participation of $10\frac{5}{8}\%$ for the total amount advanced, \$425,000.00.

The other partners in the firm have acquiesced in writing to this agreement.

Your affectionate son,

/s/ HAROLD.

/s/ H. J. BARNESON."

HJB-E

On January 1, 1930, J. Leslie Barneson became a general partner in H. J. Barneson & Co. Leslie's contribution to the partnership capital was recited in the partnership agreement to be \$150,000.00, which he obtained from his father and which was a part of or derived from whatever rights were possessed by John Barneson as a result of his transfer of the aforesaid \$425,000.00 to Harold J. Barneson. The contribution of John Barneson to the

partnership was recited in the partnership agreement to be \$275,000.00, which was the excess of the aforesaid \$425,000.00 over the sum of \$150,000.00 assigned to Leslie in exchange for Leslie's demand note for \$150,000.00 dated January 1, 1930, payable to John Barneson.

6. At all times material hereto, John Barneson kept double-entry books of account. Said books contain an account payable entitled, "Muriel E. Barneson Loan a/c", a photostat copy of which is attached hereto as Exhibit A. This account contains two items only, both credits, namely, May 8, 1928, journal entry 2368A, in the amount of \$100,000.00; May 15, 1929, cash in the amount of \$50,000.00; balance, \$150,000.00. Said books also contain another and different account with Muriel entitled "Muriel E. Barneson". This account contains numerous debits and credits; photostats of two pages of this account, covering the periods between January 24, 1926, and December 27, 1928, and between December 31, 1928, and December 3, 1931, are attached hereto as Exhibits B and B-1, respectively. (The Muriel E. Barneson mentioned in the two aforesaid accounts and elsewhere in this Stipulation is the plaintiff herein.)

7. On April 3, 1928, Muriel E. Barneson wrote her check, No. 443, on the Bank of California National Association, San Francisco, to the order of John Barneson in the amount of \$25,000.00. Said check was endorsed by John Barneson and was paid to him by said bank (in which he also had an

account) on April 12, 1928. The aforesaid "Muriel E. Barneson" account (Exhibit B) contains a credit entry of \$25,000.00 under date of April 12, 1928, representing the cash transferred by the aforesaid check dated April 3, 1928. A photostat copy of said check (front and back) and of the stub thereof are attached hereto as Exhibit C.

8. On May 8, 1928, Muriel E. Barneson wrote another check, No. 444, on The Bank of California National Association, San Francisco, to the order of John Barneson in the amount of \$105,000.00, a photostat copy of which (front and back) and of the stub thereof are attached hereto as Exhibit D. Said check was endorsed by John Barneson and was paid to him by said bank on May 8, 1928. The aforesaid "Muriel E. Barneson" account (Exhibit B) contains a credit entry of \$105,000.00 under date of May 8, 1928, representing the cash transferred by the aforesaid check dated May 8, 1928. Said "Muriel E. Barneson" account also contains a debit entry under date of May 8, 1928, recording "Transfer to Loan a/c" of \$100,000.00 out of the then credit balance of said "Muriel E. Barneson" account by journal entry 2368A. The "Loan a/c" referred to in the immediately preceding sentence is the aforesaid "Muriel E. Barneson Loan a/c" (Exhibit A). On May 23, 1928, John Barneson wrote a check to Muriel E. Barneson in the amount of \$35,356.76, the amount of the then credit balance in the "Muriel E. Barneson" account, and a debit entry of that date of \$35,356.76 balanced said account.

9. On May 14, 1929, Muriel E. Barneson wrote her check, No. 378, on The Bank of California National Association, San Francisco, to the order of John Barneson in the amount of \$50,000.00, a photostat copy of which (front and back) and of the stub thereof (which bears No. 377) are attached hereto as Exhibit E. Said check was endorsed by John Barneson and was paid to him by said bank on May 14, 1929. The amount of said check was credited to the "Muriel E. Barneson Loan a/c" (Exhibit A) under date of May 15, 1929. The words on said stub which appear below the words "Pay John Barneson" are in Muriel's handwriting in pencil and are "I think H J B Partnership".

10. John Barneson's aforesaid books of account also contain an account entitled, "Harriet E. Barneson Loan a/c", a photostat copy of which is attached hereto as Exhibit F. (The Harriet E. Barneson therein referred to was the wife of John Barneson and is the same person as the Harriet E. Barneson mentioned elsewhere herein.) Said account contains two credit items, namely May 8, 1928, in the amount of \$100,000.00; July 22, 1929, \$50,000.00. Such was the condition of said account on the date of death of Harriet E. Barneson, to wit, April 14, 1936. Said \$150,000.00 balance was fully paid to Harriet's estate by John Barneson on April 27, 1937, and appropriate entries were made on the debit side of said account. (See Exhibit F.)

11. John Barneson's aforesaid books of account contain an account that was originally entitled

“Special Partnership—H. J. Barneson & Co.”, above which original title there was subsequently written—following the organization of Walsh, O’Connor & Barneson in December, 1930—the words, “Walsh, O’Connor & Barneson, successors to”, so that the account was entitled, subsequent to December, 1930, as follows:

Walsh, O’Connor & Barneson
Successors to

Special Partnership—H. J. Barneson & Co.

A photostat copy of said account is attached hereto as Exhibit G.

12. In the month of July, 1928, John Barneson received the first return or income on the \$300,000.00 which he had transferred to Harold during the months of April and May, 1928, as related above. On July 25, 1928, John Barneson received a return or income of \$17,917.28, and on the same date he paid \$5,972.42 to Harriet and an identical sum to Muriel. On October 13, 1928, John Barneson received from the same source the sum of \$15,377.78, and on the same date he paid \$5,125.93 to Harriet and an identical sum to Muriel. The total return or income which Muriel received during the calendar year 1928 with reference to the \$100,000.00 which she transferred to John Barneson in April or May, 1928, as related above, was \$11,098.35 (\$5,972.42 plus \$5,125.93).

13. Muriel’s Federal Income Tax Return for 1928 reported said \$11,098.35 as Item 4; the printed

form of return (Form 1040) called for "4. Income from Partnerships. (State name and address)." In the space provided on the tax return form for the insertion of "name and address" of the "Partnerships," there appears in typewriting the words: "H. J. Barneson & Co., San Francisco". The \$11,098.35 which Harriet received during 1928 with reference to the \$100,000.00 which she transferred to John Barneson, as related above, was reported on Harriet's 1928 Federal Income Tax Return in identically the same manner as the \$11,098.35 received by Muriel was reported.

14. In the month of July, 1929, John Barneson received a return or income on the \$425,000.00 which he had transferred to Harold during April and May, 1928, and May and July, 1929, as related above. On July 23, 1929, John Barneson received a return or income of \$44,162.88, and on the same date he paid \$14,720.96 to Harriet and an identical sum to Muriel. Muriel's 1929 Federal Income Tax Return contains an item (Item 5, Form 1040) reading as follows: "5. Income from Partnerships. (State name and address) H. J. Barneson & Co., San Francisco, \$14,720.96". Harriet's 1929 return is identical to Muriel's insofar as Item 5 is concerned.

15. Muriel was never named as a partner, general or limited, in any written partnership agreement of any partnership called H. J. Barneson & Co. or Walsh, O'Connor & Barneson; nor was

Harriet. John was never named as a partner, general or limited, in any written partnership agreement of any partnership called H. J. Barneson & Co. or Walsh, O'Connor & Barneson until he was named as a limited partner in the articles of partnership of H. J. Barneson & Co. as of January 1, 1930. The articles of partnership of the partnerships called H. J. Barneson & Co. and Walsh, O'Connor & Barneson expressly prohibit the partners thereof, general and limited, from assigning all or any part of their interests therein. The records of the New York Stock Exchange do not show that Muriel, Harriet or John Barneson was a member, general or limited, of any partnership named H. J. Barneson & Co. or Walsh, O'Connor & Barneson, except that John Barneson became a limited partner of H. J. Barneson & Co. as of January 1, 1930, and became a limited partner in Walsh, O'Connor & Barneson on its formation in December, 1930.

16. Neither Muriel nor Harriet received any return or income during the calendar year 1930 from or with respect to the \$150,000.00 which each transferred to John Barneson during 1928 and 1929 as related above. During the calendar year 1930 John Barneson received no return or income from or with respect to the \$425,000.00 which he transferred to Harold as related above.

17. The Articles of Limited Partnership of Walsh, O'Connor & Barneson, dated December 13, 1930, contained the following provisions, among others:

“Ninth: * * * Each of the general partners devoting all or part of his time to the partnership business shall be paid a salary, the amount and time and manner of payment of which shall be fixed from time to time by a two-thirds majority in interest of the general partners. Such salaries shall be considered as an expense of the business and shall be paid before interest on capital contributions and before distribution of profits, but after the interest on partners’ loans.

“Tenth: After payment of expenses of the business, including interest on loans of partners, and partners’ salaries, all profits of the partnership shall be paid and applied as follows and in the following order of priority:

“a. On or before the 10th day of each calendar month each of the limited partners shall be paid the sum of \$1500. Should the profits for any month be insufficient to pay said sums, then any deficiency shall be cumulative, but without interest, and shall be paid from subsequent profits before the general partners are entitled to share therein.

“b. Each of the general partners shall be paid interest at the rate of five per cent per annum on his net capital contribution, the same to be paid or credited at the end of each calendar month. Should the profits for any month be insufficient to pay the interest on net capital contributions, then any deficiency shall be cumulative, but without interest, and shall be paid without interest from subsequent profits before any further division of partnership profits.

“c. The balance of the profits, if any, shall be divided among the partners as follows:

Kenneth Walsh	21½ per cent
George R. O'Connor	16 per cent
Cliff M. Weatherwax	5 per cent
Arthur N. Earll	3½ per cent
R. M. Marshall	2 per cent
Eric L. Pedley	2 per cent
H. J. Barneson	27½ per cent
J. Leslie Barneson	7½ per cent
James D. Kennedy	7½ per cent
Edward M. Walsh	0 per cent
John Barneson	7½ per cent

“Profits shall be ascertained on the 30th day of June and the 31st day of December of each year. Any profits ascertained as of the 30th day of June for division according to said percentages shall be credited to the partners’ accounts, but, unless otherwise decided by a two-thirds majority in interest of the general partners, shall not be disbursed, nor drawn against by any partner until after the completion of the annual audit as of December 31.

“The said percentages shall determine the respective interests of the partners.”

18. During the calendar year 1931 John Barneson received eleven monthly payments, totalling \$14,200.00, from Walsh, O'Connor & Barneson as a return or income on the \$275,000.00 referred to in paragraph 5 of this Stipulation. The checks of the firm were transmitted by letters addressed to John

Barneson in Hillsborough, California (where he lived), and signed by the firm's Cashier in Los Angeles; the letter of April 30, 1931, is fairly typical and describes the check as "representing partner's compensation for the month of April 1931." On or within a few days after the dates upon which John Barneson received such "partner's compensation" from Walsh, O'Connor & Barneson, John Barneson made payments to Harriet and Muriel totalling \$5,163.80 each as a return or income on the \$150,000.00 which each of them had transferred to him in 1928 and 1929 as aforesaid. Muriel's 1931 Federal Income Tax Return, which was made on Treasury Form 1040, contains nothing as Item 5, "Income from Partnerships", but does include the sum of \$4,363.80 which she received in 1931 from John Barneson as Item 1, which is described in the printed portion of Form 1040 as "1. Salaries, Wages, Commissions, etc. (State name and address of employer)". In the space which said Form 1040 provides for insertion of the name of the employer, said return shows in typewriting the following: "Walsh, O'Connor & Barneson—\$4,363.80." The payments which Muriel received from John Barneson during the eleven months, January to November, 1931, both inclusive, varied from a low of \$272.75 (in January) to a high of \$545.50 (in February, March and April) and aggregated \$5,163.80. The difference between that amount and the amount of \$4,363.80 reported on her 1931 return, namely, \$800.00, was the aggre-

gate of the two payments of \$400.00 each which Muriel received from John Barneson on October 7, 1931, and November 2, 1931, following John's receipt of "partner's compensation" for the months of September and October, 1931. John Barneson's books of account contain a journal entry under date of December 30, 1931, reading as follows:

"Harriet E. Barneson	800.00
Muriel E. Barneson	800.00
Compensation	600.00
Suspense	2,200.00

To reverse compensation for Sept. & October paid by Walsh, O'Connor & Barneson in error, as not earned. This amount to be refunded."

Under date of January 2, 1932, John Barneson made said refund to Walsh, O'Connor & Barneson by his check No. 4569 in the amount of \$2,200.00. The aforesaid Muriel E. Barneson account on John Barneson's books contains a debit entry under date of December 30, 1931, in the amount of \$800.00, with the explanation "Compensation Refund." Thus the gross and net amounts which Muriel received from John Barneson during 1931 as "compensation" were \$5,163.80 and \$4,363.80, respectively (Exhibit B-1). Muriel was never at any time an employee of Walsh, O'Connor & Barneson.

19. Harriet's 1931 Federal Income Tax Return, like Muriel's, was made on Treasury Form 1040, and was a separate return. The net aggregate of \$4,363.80, which Harriet, like Muriel, received from

John Barneson in 1931 following his receipt of "partner's compensation" from Walsh, O'Connor & Barneson, was reported as Item 1 income as follows:

"1. Salaries, Wages, Commissions, etc. (State name and address of employer) Walsh, O'Connor and Barneson			\$4,363.80
Less one-half reported by John Barneson			2,181.90
			\$2,181.90"

Harriet was never at any time an employee of Walsh, O'Connor & Barneson.

20. In 1932 there was only one payment made by Walsh, O'Connor & Barneson to John Barneson, and only one payment by John Barneson to Muriel and to Harriet. This occurred on March 21, 1932, when John Barneson paid Muriel and Harriet \$400.00 each following the receipt by him of "compensation" of \$1100.00 from Walsh, O'Connor & Barneson. Muriel's 1932 Federal Income Tax Return reported this \$400.00 as Item 3 income—"Interest on Bank Deposits, Notes, Corporation Bonds, etc." The \$400.00 is included with three other items of interest in the total of \$475.23 shown as Item 3. No amount of income was reported in Muriel's said 1932 return as either Item 1—"Salaries," etc.—or as Item 5—"Income from Partnerships, Syndicates, Pools, etc."

21. By the end of the calendar year 1932 the entire proprietary interest of all partners in Walsh, O'Connor & Barneson, general and limited, was wholly lost as a result of the business reverses suffered by said partnership. In John Barneson's

1932 Federal Income Tax Return, he claimed a loss, as a result of the financial failure of the firm of Walsh, O'Connor & Barneson, of the entire \$425,000.00 above mentioned, \$150,000.00 of which he had received from Harriet and \$150,000.00 of which he had received from Muriel. Said return (which was a joint return of John and Harriet) showed various items of gross income aggregating \$199,938.20, but other losses and deductions (additional to the loss of \$425,000.00) were claimed on said return in an aggregate amount of \$374,669.41. The tax liability shown on said return was zero. Under date of January 25, 1934, the then Internal Revenue Agent in Charge at San Francisco addressed and mailed a letter to John Barneson advising that his office was recommending to the Commissioner of Internal Revenue that John Barneson's income tax return for the year 1932 "be accepted as correct." Nothing in this paragraph is to be construed as an admission by the defendant as to the amount of John Barneson's loss resulting from the failure of Walsh, O'Connor & Barneson.

22. Muriel's 1932 Federal Income Tax Return showed items of gross income aggregating \$74,350.52, deductions of \$722.55, net income of \$73,627.97, and total tax payable (after credit for income tax paid at source) of \$11,340.38. Said tax liability of \$11,340.38 was fully and duly paid and no portion thereof has ever been refunded, credited or repaid. The only loss claimed on said return was a loss of \$2,865.74 sustained on the sale of shares

of stock of Socony-Vacuum Corporation. Muriel never claimed any federal income tax deduction whatever with respect to the aforesaid \$150,000.00, transferred to John Barneson in 1928 and 1929 as related above, in any taxable year except the calendar year 1941, the tax liability of which is in controversy in this case; and the Commissioner has never allowed any part of said \$150,000.00 as a deduction from Muriel's gross income in any taxable year.

23. The alleged debts of \$150,000.00 each from John to Muriel and from John to Harriet were never evidenced by any promissory note; nor were said debts, or either of them, ever acknowledged in writing by John except by John's books of account as related above. No payments of interest or other payments were made by John Barneson to either Harriet or Muriel on the aforesaid alleged loans of \$150,000.00 each other than as shown in this Stipulation.

24. In due course following the death of Harriet E. Barneson on April 14, 1936, to wit, July 6, 1937, the executors of her will (The Bank of California National Association, and her sons, Lionel T. and J. Leslie Barneson) filed with the then United States Collector of Internal Revenue for the First District of California, the federal estate tax return (Treasury Form 106) of her estate. Said return reported (Schedule Q) a total gross estate (Item 1) in the amount of \$2,759,642.60 and a net estate (Item 9) in the amount of \$2,603,660.35. Among the items comprising the gross estate of \$2,759,642.60 was an item

of \$150,000 (Schedule F, Item 5) representing the balance of \$150,000.00 standing to the credit of Harriet E. Barneson on April 14, 1936, in the aforesaid "Harriet E. Barneson Loan a/c" on the books of John Barneson (Exhibit F). The correct net federal estate tax liability of the Estate of Harriet was finally determined by the Tax Court of the United States to be \$659,521.30 (after deducting the credit for State estate, inheritance, legacy or succession taxes) and said net estate tax liability was fully paid. Said tax liability reflected the inclusion in Harriet's gross and net estate of the aforesaid item of \$150,000.00 at a value equal to its full face value. If Harriet's net estate had been \$150,000.00 less in amount than as finally determined, the correct net federal estate tax liability would have been \$610,869.02, or \$48,652.28 less than the amount which was finally determined and fully paid.

25. The estate of John Barneson, who died February 25, 1941, was probated in the Superior Court of the State of California, in and for the County of San Mateo, case No. 9360 in the files of said court. Lionel T. Barneson was the Executor of John Barneson's will. On June 23, 1941, plaintiff, acting through Lionel T. Barneson, as Guardian of her person and estate, filed in the Superior Court of the County of San Mateo, in case No. 9360, a "Creditor's Claim" for \$150,000.00 (a copy of which is attached hereto and marked Exhibit H), covering the same items as are included in the aforesaid "Muriel E. Barneson Loan a/c" (Exhibit A). Said claim was rejected on the

same date by Honorable A. R. Cotton, Judge of said Court, on the ground that it was barred by the statute of limitations. Plaintiff did not bring suit on said claim within three months after June 23, 1941, or at any other time. The final determination of the federal estate tax liability of John Barneson's estate was based upon a determination by the Commissioner of Internal Revenue (hereinafter referred to as the "Commissioner") of a gross estate of \$737,434.35 (all of which property was owned by John Barneson at the date of his death) and a net estate (after deducting the specific exemption of \$100,000.00) of \$569,018.82. The net federal estate tax finally paid on the estate of John Barneson was \$113,722.55. In said determination of John Barneson's net estate the Commissioner allowed no deduction whatever for the balance of \$150,000.00 shown in the aforesaid "Muriel E. Barneson Loan a/c" (Exhibit A). At all times material hereto John Barneson possessed the requisite financial ability to have paid \$150,000.00 to plaintiff on demand. The alleged claim of \$150,000.00 of Muriel, an incompetent person, against John was never listed or mentioned in any inventory filed in the court having jurisdiction over the incompetent's guardianship estate.

26. On or before March 15, 1942, plaintiff filed with the then Collector of Internal Revenue for the First District of California, her federal income tax return for the calendar year 1941 on Form 1040 of the Treasury Department Internal Revenue

Service. Said return showed the following items of gross income and deductions therefrom:

INCOME	
2. Dividends	\$102,525.45
3. Interest on bank deposits, notes, etc.	382.47
5. Rents and royalties.....	15,708.47
7. (b) Net long-term (loss) from sale or exchange of capital assets.....	(423.15)
8. Net profit (or loss) from business or profession	490.79
9. Income from partnerships; fidu- ciary income, and other income....	14,191.23
10. Total income in items 1 to 9.....	<u>\$132,875.26</u>
DEDUCTIONS	
12. Interest	220.68
13. Taxes	12,510.62
15. Bad debts	150,000.00
16. Other deductions authorized by law	45.11
17. Total deductions in items 11 to 16.....	<u>\$162,776.41</u>
18. Net income (item 10 minus item 17).....	.00

Item 15—\$150,000.00—was the same item or items reflected in the “Creditor’s Claim” mentioned in paragraph 25 above. Plaintiff has not claimed and the Commissioner has not allowed any part of said \$150,000.00 as a deduction from plaintiff’s gross income in any other taxable year. Muriel had a federal income tax liability in every year from 1932 to 1940, both inclusive, and all such liabilities were paid and satisfied in full.

27. Plaintiff’s income tax return for the calendar year 1941 was in due course examined by an Examining Officer acting under F. M. Harless, Internal Revenue Agent in Charge at San Francisco, California. Said Examining Officer made a report asserting a deficiency of \$70,388.20 in plaintiff’s income tax for the calendar year 1941. Plain-

tiff thereafter duly filed a written and verified protest against said asserted deficiency and conference was had between representatives of the plaintiff and a member of the Conference Section of the Office of the Internal Revenue Agent in Charge at San Francisco. Subsequently, the Commissioner, acting by and through the aforesaid F. M. Harless, Internal Revenue Agent in Charge, mailed to the plaintiff notice of his final determination of plaintiff's federal income tax liability for the calendar year 1941, which notice was dated June 25, 1945, and asserted a deficiency of \$70,369.97. Said asserted deficiency was based upon six adjustments, which were set forth in the statement attached to the aforesaid final notice of deficiency as follows:

"ADJUSTMENTS TO NET INCOME"

"Net income (loss as disclosed by return)....."			\$(299,901.15)
Unallowable deductions and additional income:			
(a) Bad debt	\$150,000.00		
(b) Rents and royalties.....	4,441.11		
(c) Long-term capital gain.....	585.43		
(d) Fiduciary income	2,745.17		
(e) Dividends	31.99	157,803.70	
Total			\$127,902.55
Nontaxable income and additional deductions:			
(f) Guardianship fees		3,000.00	
Net income adjusted.....			\$124,902.55"

Plaintiff does not contest the correctness of the Commissioner's adjustments (b), (c), (e) and (f) above but does challenge adjustment (a) in its entirety and adjustment (d) in part. (See paragraph 30 of this Stipulation as to adjustment (d).)

28. On June 28, 1945, plaintiff paid to defendant, as Collector of Internal Revenue for the First District of California, the sum of \$70,369.97, as federal income tax asserted by the Commissioner to be owing by plaintiff for the calendar year 1941. At the time said payment was made to the defendant, however, said defendant was given written notice that plaintiff contended that she had no income tax liability whatever for the calendar year 1941; that the amount of said asserted tax, to wit, \$70,369.97, and any interest thereon which might subsequently be paid by plaintiff, were paid under protest; and that plaintiff reserved all rights to file a claim for refund for the entire amount paid and in the event said claim was rejected, in whole or part, to bring suit to recover against said defendant or the United States, as the plaintiff might later be advised. Defendant acknowledged receipt of said written protest June 28, 1945. Subsequently, defendant issued a notice and demand on plaintiff for the payment of interest in the amount of \$13,-872.52 on the aforesaid asserted tax deficiency of \$70,369.97, and, pursuant to said demand, plaintiff paid to the defendant, as interest asserted by defendant to be due from plaintiff, the sum of \$13,-872.52 on October 18, 1945.

29. Within the time and in the manner provided by law, plaintiff filed with the defendant on Form 843 of the Treasury Department Internal Revenue Service, a claim for refund of the tax and interest referred to in paragraph 28 above,

which claim was entirely adequate to lay the foundation for this action. The Commissioner failed to render a decision on said claim within six months of the date on which it was filed, or at all. See Complaint, pars. 15 and 16, and Answer, pars. XI and XII.

30. The "net income adjusted" in the amount of \$124,902.55 (see paragraph 11, page 12, of the Complaint herein; also paragraph 27 of this Stipulation) upon the basis of which the Commissioner determined the asserted deficiency of \$70,369.97, should be reduced by reducing plaintiff's "Fiduciary income" by the amount of \$1,504.22 (25% of the amount of \$6,016.88 mentioned in paragraph 12 of the complaint).

31. It is agreed that if plaintiff was entitled to the deduction of \$150,000.00 which she claimed as Item 15 on her return for the taxable year 1941, as related above, then she is entitled to a judgment that she recover from the defendant the sum of \$84,242.49 together with interest, as provided by law, on \$70,369.09 of said amount from June 28, 1945, and on \$13,872.52 of said amount from October 18, 1945. On the other hand, if plaintiff is not entitled to the aforesaid deduction of \$150,000.00, then she is nevertheless entitled to a judgment that she recover from the defendant the sum of \$1,242.54, together with interest, as provided by law, on \$1,037.92 of said amount from June 28, 1945, and on \$204.62 of said amount from October 18, 1945.

32. It is agreed that even although the Exhibits

referred to in this Stipulation are bound separately (for the convenience of the Clerk in filing) they may nevertheless be deemed to be "attached hereto." (Compare e.g., paragraph 6, page 5, line 27 of this Stipulation.)

Dated: September 23, 1948.

BRADY & NOSSAMAN,
By /s/ JOSEPH D. BRADY
and /s/ JAMES L. WOOD,
Attorneys for Plaintiff.
FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.
By /s/ WILLIAM E. LICKING,
Asst. U. S. Attorney.

[Endorsed]: Filed Sept. 24, 1948.

(Here follow Exhibits A, B, B-1, C, D, E, F, G and H, attached to Stipulation of Facts, filed September 24, 1948.)

[Title of District Court and Cause.]

STIPULATION TO CORRECT REPORTER'S TRANSCRIPT

It is hereby stipulated by and between the parties hereto, by their respective counsel, that the Reporter's Transcript of the testimony taken at the trial of the above case heard before Honorable Louis E. Goodman, Judge, on September 28, 1948 be corrected, or treated as corrected, in the following particulars:

Pg.	Line	As Reported	As Corrected
Cover		Lionel Barneson	Lionel T. Barneson
Cover		James E. Smyth	James G. Smyth
1	7	Lionel Barneson	Lionel T. Barneson
1	10	James E. Smyth	James G. Smyth
1	21	James D. Brady	Joseph D. Brady
1	21	Wallace L. Nosseman	James L. Wood
2	7	Barnason	Barneson
2	17	deficit	deficiency
3	20,	assumedly that that	assuming that there
	21	subsisting debt on	was a subsisting debt
		January 1, 1941, be-	on January 1, 1941,
		came	it became
5	8	txable	taxable
7	12	she	he
8	7	ths	this
9	15	tha	that
10	9	1921	1928-1929
10	11	is that	is it that
11	6	death	debt
12	6	ventures	venturers
12	8	sons	sums
12	9	and the \$150,000	and the \$125,000
13	12	Harriet	Harold
14	11	\$400,000	\$425,000
16	8	H. J. Barneson	H. J. Barneson & Co.
		Company	
16	16	H. J. Barneson	H. J. Barneson & Co.
		Company	

Pg.	Line	As Reported	As Corrected
16	19	J. H. Barneson & Company	H. J. Barneson & Co.
16	23	our	out
17	13	ca	can
20	18	1930	1931
21	9	1930	1931
21	20	1941	1931
22	12	1933	1935
22	16	1933	1935
24	24	this owed	this debt owed
37	11	you	he
38	4	incompetent	incompetent's
41	13	brought	brother
41	16	mother's	Muriel's
42	18	Mr. Grady	Mr. Brady
43	19	onme	one
47	24	Mr. Grady	Mr. Brady
48	24	Mr. Grady	Mr. Brady
55	7	Harrie	Harriet
55,	10	Clerk	Collector

Dated October 28, 1948.

BRADY & NOSSAMAN,

By /s/ JOSEPH D. BRADY

and /s/ JAMES L. WOOD,

Attorneys for Plaintiff.

FRANK J. HENNESSY,

U. S. Attorney,

Attorney for Defendant.

By /s/ WILLIAM E. LICKING,

Assistant U. S. Attorney.

[Endorsed]: Filed Oct. 29, 1948.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

The evidence satisfies me that the deduction claimed by the plaintiff in her 1941 income tax return as a worthless debt is proper. It was in fact a "debt which became worthless within the taxable year." (1941). § 23(k)(1) Int. Rev. Code.

Accordingly judgment may be entered for plaintiff as prayed upon findings to be presented in accordance with the Rules.

Dated: February 7, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Feb. 8, 1949.

[Title of District Court and Cause.]

ORDER OF COURT

Upon the application of C. Elmer Collett, Assistant United States Attorney for the Northern District of California, and good cause appearing therefor,

It Is Hereby Ordered that the defendant above named may have to and including March 1, 1949 within which to lodge counter Findings of Fact and Conclusions of Law, or proposed amendments

to plaintiff's Finding of Fact and Conclusions of Law heretofore lodged in the above action.

Dated: February 18, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Feb. 18, 1949.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED AMENDED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action regularly came on for trial, without a jury, on September 28, 1948, before the Honorable Louis E. Goodman, Judge presiding, the plaintiff in said action appearing by her counsel, Brady & Nossaman, of Los Angeles, by Joseph D. Brady, Esq. and James L. Wood, Esq., and the defendant in said action appearing by his counsel, Frank J. Hennessy, Esq., United States Attorney, and William E. Licking, Esq., Assistant United States Attorney. Having considered the pleadings, admissions, oral testimony, stipulated facts, and arguments of counsel, the Court makes and publishes the following:

Findings of Fact

The Court finds that:

Upon the trial the parties through their respective counsel duly made and filed their written stipu-

lation of facts. As and for its findings of fact the Court adopts said stipulation, including the exhibits attached thereto, and, based upon said stipulation as supplemented by certain admissions and oral testimony, finds the essential facts to be as follows:

I.

That at all material times plaintiff, Muriel E. Barneson, and Lionel T. Barneson were, and still are brother and sister, citizens of the United States, domiciled in the State of California.

II.

That the plaintiff, Muriel E. Barneson, on March 3, 1931, became a mentally incompetent person and has at all times since been incapable of caring for her property or understanding the nature or effect of her acts. (Tr. 19, 20, 21). Between March, 1931, and April, 1936, Muriel's affairs were handled for her by her mother under a power of attorney (Tr. 21). Plaintiff was adjudged to be an incompetent person by the Superior Court of Ventura County, State of California, on April 3, 1936. Lionel T. Barneson has at all times since April 3, 1936, been the duly appointed, qualified and acting guardian of her person and estate.

III.

Defendant is, and at all times since May 14, 1945, has been, the duly appointed and acting Collector of Internal Revenue for the First District of California.

IV.

That on May 8, 1928, Muriel Barneson advanced the sum of \$105,000.00 to her father, John Barneson, by her check numbered 444 (Ex. D. Stip.). John Barneson entered this advance upon his books (Ex. B of Stip.) by crediting Muriel Barneson for a loan of \$105,000.00. On the same day he debited the same account with an entry "Transfer to Loan A/C J.2368a \$100,000.00." That last credit entry to said account (Ex. B & B-1 of Stip.) was made in 1941 (Tr. 59). The last debit entry to said account was made in 1941. In another account kept by John Barneson (Ex. A of Stip.) upon identical sheets (Form B-9117) and entitled in said book "Muriel E. Barneson, Loan A/C a credit entry dated May 8, 1928. J 2368 A \$100,000.00" appears. On May 14, 1929 Muriel Barneson advanced the sum of \$50,000.00 to John Barneson by her check numbered 378 (Ex. E Stip.). No entry was made in the Muriel E. Barneson account for said check, but a credit entry was made in the Muriel E. Barneson loan account for the amount of said check on May 15, 1929.

V.

The plaintiff duly filed her federal income tax return for the calendar and taxable year 1941; in that return she claimed a bad debt deduction in the amount of \$150,000.00 representing the aforesaid advancements to John Barneson, her father. Subsequently, said return was examined by the Inter-

nal Revenue Agent in Charge at San Francisco who disallowed the claimed bad debt deduction of \$150,000.00, made certain other adjustments and eventually asserted on behalf of the Commissioner of Internal Revenue a deficiency in income tax for the taxable year 1941 of \$70,369.97. Plaintiff did not claim, and the Commissioner has not allowed any part of said \$150,000.00 as a deduction from plaintiff's gross income for any taxable year.

VI.

On June 28, 1945, the plaintiff paid to the defendant, as Collector of Internal Revenue, the sum of \$70,369.97, the amount asserted as a deficiency in income tax for the taxable year 1941, and on October 18, 1945, plaintiff paid defendant the further sum of \$13,872.52 as interest on said asserted deficiency. Of said deficiency, \$1,037.92, and interest in the amount of \$204.62, arose from adjustments to gross income other than the disallowance of said bad debt deduction, and it has been stipulated that plaintiff is entitled to recover these later sums with interest as provided by law regardless of the decision as to the bad debt issue.

VII.

Plaintiff filed an appropriate and timely claim for refund of the deficiency in tax and interest above mentioned and the Commissioner of Internal Revenue failed to render a decision thereon within six months after the date of filing or at all.

VIII.

No part of the deficiency in income tax or interest paid by the plaintiff for the taxable year 1941 has been refunded, credited or repaid.

Conclusions of Law

As Conclusions of Law from the foregoing Findings of Fact, the Court concludes that:

I.

The Court has jurisdiction of the parties and the subject matter of this action.

II.

Plaintiff commenced this action within the time and in the manner provided by law.

III.

On January 1, 1941, John Barneson was indebted to the plaintiff, Muriel E. Barneson, in the amount of \$150,000.00 because of cash advances made to him by said Muriel E. Barneson on the 8th day of May, 1928, in the sum of \$105,000.00, and on the 14th day of May, 1929, in the sum of \$50,000.00 upon a mutual and open account (Ex. B, B-1 Stip.), no part of which has ever been repaid.

IV.

Said indebtedness of \$150,000.00 was not worthless or outlawed on February 25, 1941, the date of John Barneson's death, or at any time prior thereto, nor was it barred or outlawed by the applicable

California statutes of limitation on June 23, 1941, for the reason that said debt was upon an open, mutual and current book account between Muriel Barneson and John Barneson, her father (Ex. B, B-1, Stip.), and the last entries in said account had been made in the year 1941 but Muriel Barneson became an insane and incompetent person on March 3, 1931, and has been such at all times since.

V.

Said debt became worthless within the taxable year 1941 by reason of the failure, neglect and refusal of Lionel Barneson as guardian of Muriel E. Barneson, an incompetent person, to file suit against himself as executor of John Barneson's Will within three months after rejection of Muriel Barneson's claim for said debt on June 23, 1941, by A. R. Cotton, Judge of the Superior Court of the State of California in and for the County of San Mateo, case No. 9360 as required by Section 714 of the Probate Code of the State of California. Said claim was at the time of its presentation and also at the time of its rejection on June 23, 1941, good, valid, existing and not an outlawed or barred claim against the estate of said John Barneson upon a mutual, open and current book account between said Muriel Barneson and John Barneson, deceased, and the operation of the statute of limitations against the collection of said account had been and was suspended at all times after March 3, 1931, because of the insanity of Muriel Barneson which

commenced at said time and has continued at all times since (see Secs. 352, 357, 337, .2 (3) California Code of Civil Procedure). Had Lionel Barneson brought suit upon the rejected claim for said indebtedness of \$150,000.00, he was entitled to recover a judgment against the estate of John Barneson, deceased for that amount, and the estate was possessed of assets sufficient to pay said judgment.

VI.

Plaintiff was not entitled by the provisions of Section 23(k)(1) of the Internal Revenue Code as amended to deduct from her gross income for the taxable year 1941 the amount of \$150,000.00 as a bad debt.

VII.

Plaintiff is not entitled to recover from the defendant the sum of \$84,242.49 with interest as provided by law on \$70,369.97 of said amount from June 28, 1945, and on \$13,872.52 of said amount from October 18, 1945.

VIII.

That there was probable cause for the actions of the defendant or other officials of the Treasury Department as found by the Court, and the judgment to be entered herein upon becoming final shall be provided for and paid out of the proper appropriation from the Treasury of the United States.

Dated this day of March, 1949.

.....

Judge of the District Court.

Approved as to form as provided by Rule 5(d)
of this Court.

FRANK J. HENNESSY,

U. S. Attorney.

Lodged March 1, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFEND-
ANT'S PROPOSED AMENDED FIND-
INGS OF FACT AND CONCLUSIONS OF
LAW

Plaintiff respectfully presents the following ob-
jections to Defendant's Proposed Amended Find-
ings of Fact and Conclusions of Law:

Preliminary Statement

Pursuant to "Order for Judgment" for plaintiff,
filed February 8, 1949, plaintiff, on February 14,
1949, lodged Findings of Fact and Conclusions of
Law as well as a form of Judgment, all approved
as to form by counsel for defendant.

On March 1, 1949, defendant lodged "Defend-
ant's Proposed Amended Findings of Fact and
Conclusions of Law." They are utterly inconsistent
with the "Order for Judgment". For many reasons
hereinafter set forth, it is submitted that they
should be rejected and that the Court should make
findings and conclusions substantially as lodged by
plaintiff.

Basis of Defendant's Proposed
Findings and Conclusions

The basis for the extraordinary findings and conclusions proposed by defendant is explained in a letter dated March 1, 1949, from counsel for defendant to Judge Goodman, copy of which counsel for plaintiff received March 3, 1949.

Completely reversing the position taken by the defendant at the trial and in its brief, namely, that the \$150,000 debt was barred not later than 1933, defendant now contends that the debt was not barred at the time the probate court rejected it on June 23, 1941. From this premise, defendant now asserts (letter March 1, 1949, p. 2) that "it is believed a collectible judgment could have been recovered" had plaintiff's guardian sued the estate of John Barneson within the three months' period prescribed by Section 714 of the Probate Code. "The point is," says defendant, "that while the debt became worthless in 1941, that worthlessness was the result of the voluntary act of the guardian-plaintiff * * *." (Underscoring supplied.)

Plaintiff's Reply to New Position of Defendant.

1. Defendant should not now be heard to argue that the California statute of limitations had not run prior to the taxable year 1941 for the following reasons:

(a) At the trial defendant (as well as plaintiff) took the position that the statute of limitations ran many years prior to 1941, namely, 1933. (See Tr. p. 10, lines 1-10; Tr. p. 15, lines 11-17; references

herein to the Transcript refer to it as corrected by Stipulation filed October 29, 1948.) This admission of defendant obviated the necessity, which might otherwise have existed, of the plaintiff's satisfying this Court by some other proof that the Probate Court's rejection of Plaintiff's creditor's claim was correct.

(b) In defendant's brief (p. 21, lines 30-32) the flat admission is made that the \$150,000 debt became barred "some time in 1933". Even assuming—despite the contrary position taken at the trial—that defendant could still have raised the point on brief which he now seeks to advance for the first time, the position taken in his brief constituted an election to stand on the position taken at the trial and, consequently, an abandonment or waiver of any attempt to claim that the California statute had not run even as late as February 25, 1941, the date of John Barneson's death.

(c) In the "Statement of Facts" in defendant's brief, speaking with reference to the stipulated fact that plaintiff's creditor's claim for \$150,000 was rejected by the Probate Court "on the ground that it was barred by the statute of limitations," the defendant stated that such rejection was "Pursuant to law." (Def.'s br., p. 4, line 31.) This was a flat admission by defendant that the pertinent facts were such that the rejection by the Probate Court was correct. This admission is as binding on this defendant as it would be on any litigant. Courts sit to decide issues as they are presented by

the litigants. This Court has already decided such issues in favor of plaintiff.

2. Defendant's New Position is Without Merit in any Event and His Proposed Findings and Conclusions are Otherwise Objectionable.

Defendant asks the Court to make a finding of fact that the plaintiff "became a mentally incompetent person on March 3, 1931," etc. (Defendant's Proposed Finding II, p. 2, lines 10-11.) The only testimony bearing on this subject was to the effect that plaintiff has never been able to carry on her own personal business affairs since March, 1931. (Tr. p. 20, lines 18-21, as corrected.) Putting aside the question whether such testimony would justify the finding which defendant requests, and putting aside also the question whether such a finding would be equivalent to a finding that plaintiff was "insane" since March, 1931, within Section 352(2), C.C.P., now mentioned for the first time (cf. Wade v. Busby, 66 C.A. (2d) 700), it is clear that it would not aid the defendant in any case. Section 352 states that it applies only if the disability exists "at the time the cause of action accrued." See, also, Section 357, C.C.P.

Plaintiff's cause of action accrued as to the \$150,000 and the statute of limitations started to run not later than May 15, 1929, the later of the two dates which appear in the "Muriel E. Barneson Loan a/c" (Stip. Ex. A). See Bailey v. Hoffman, 99 C.A. 347. Plaintiff was not insane or incompetent at that time. Once the statute has started to run, disability, including insanity, does not sus-

pend the time for bringing suit. Calif. Sav. etc., Soc. v. Culver, 127 Cal. 107 at 111. It is clear, we submit, that defendant is in error in thinking that Section 352 has any application here.

Defendant's Proposed Finding IV (pp. 2-3) violates the settled rule stated in Brown Paper Mill Co. v. Irvin, 134 F. (2d) 337, 338 (C.C.A.-8, 1943) as follows:

"Findings of fact should be 'a clear and concise statement of the ultimate facts, and not a statement, report, or recapitulation of evidence from which such facts may be found or inferred.' " (Citing cases; underscoring supplied.)

In any event, if some of the evidence is to be recapitulated in the findings, contrary to correct practice, all of the evidence set forth in the Stipulation of Facts should be set out in full in the findings.

Defendant's Proposed Finding IV is otherwise improper. It uses the term "advance", which is meaningless in this setting and which will not be found anywhere in the Stipulation of Facts or elsewhere in the record. The Court's "Order for Judgment" necessarily implies that the Court agreed with plaintiff that the items of \$100,000 and \$50,000 were loans. Plaintiff's Proposed Finding IV (p. 2, line 24) properly describes these two items as "loans".

Defendant's Proposed Finding IV is likewise improper and misleading because it ignores the stipulated fact that the account entitled simply

“Muriel E. Barneson” (Exs. B and B-1) is “another and different account” from that which contained the \$150,000 debt and which was known as the “Muriel E. Barneson Loan a/c” (Ex. A). (Stip., par. 6, p. 5, lines 24-26; p. 6, lines 1-8.)

In addition to being directly opposed to the Court’s “Order for Judgment”, defendant’s Conclusions of Law are otherwise improper and unsound in other respects.

There was an issue of fact in this case as to whether the cash transfers of \$100,000 and \$50,000 were loans or something else. The finding of the Court on this issue is reflected in Plaintiff’s Proposed Finding IV (p. 2). Defendant proposes no finding of ultimate fact in this regard; and defendant’s Proposed Finding IV (pp. 2-3) is not adequate. In his proposed Conclusion of Law III (p. 4), defendant does recite that John Barneson was indebted to the plaintiff in the amount of \$150,000 on January 1, 1941, but he goes on and recites evidentiary matter, in a manner which is both erroneous and highly misleading. Defendant refers (p. 4, line 21) to Exhibits B and B-1. These are merely two different pages of the same account. They are both part of the “Muriel E. Barneson” account. Exhibit A, however, is a photostat of an entirely different and separate account—the “Muriel E. Barneson Loan a/c”. (Stip., par. 6, p. 5, lines 24-30; p. 6, lines 1-8.) One can only read defendant’s Conclusion III, especially line 21, page 4, as saying that the \$50,000 item is a part of the ac-

count evidenced by Exhibits B and B-1. This is contrary to the stipulated facts; the loan of \$50,000 was never a part of the "mutual and open account". The balance of the debt of \$150,000, to-wit, \$100,000, was transferred from the "mutual and open account" to the different "Muriel E. Barneson Loan a/c" on May 8, 1928—the very same date that the item of \$105,000 went into the "Muriel E. Barneson" account (Ex. B, credit)—and never thereafter was a part of the "mutual and open account."

Conclusion of Law V, proposed by defendant (p. 5), is unsound and otherwise objectionable for a number of reasons. It is predicated on the factual assumption that Muriel was "insane" at all times after March 3, 1931, within the meaning of Section 352 C.C.P. (p. 5, lines 15-17), and no finding that she was "insane" has been proposed or could properly be made on the evidence; the evidence goes no further than to show that Muriel has not "been able to carry on her own personal business affairs since" March of 1931. (Tr. p. 20, as corrected.) But even if Muriel had been "insane" since March, 1931, that would be irrelevant; *supra*, page 4.

While conceding that the debt "became worthless within the taxable year 1941" (p. 5, line 1), defendant now asks this Court to conclude, as a matter of law (Conclusion V), that the "reason" it became worthless was because of the alleged "failure, neglect and refusal" of plaintiff's guar-

dian to bring suit on the debt within three months after rejection of the claim by Judge Cotton on June 23, 1941.

Where is there any evidence in this record to support either a finding of fact or a conclusion of law of "failure, neglect, or refusal" on the part of plaintiff's guardian in connection with his admitted omission to bring suit following Judge Cotton's rejection? Defendant points to none and there is none.

If under the law as applied to the facts, the statute of limitations ran in May, 1933 (three years, incidentally, before the guardian's appointment), then to have brought an action within three months after June 23, 1941, would obviously have been a futile gesture, particularly when such action would have been brought in the same court. The guardian was in the court house in Redwood City when the attorney presented the claim to Judge Cotton in chambers. (Tr. 37) The claim (Stip., Ex. H) shows on its face that the statute ran in 1933, and on its back it shows the rejection by Judge Cotton.

If the guardian's refraining from bringing what any reasonable man, cognizant of Judge Cotton's action and the basis thereof, would have regarded as a futile suit, involved what defendant now characterizes by the terms "failure, neglect and refusal," why did not counsel for defendant interrogate the guardian in this respect when he was on the witness stand?

The answer is obvious: after careful study of the whole case incident to the careful preparation of the 22-page stipulation of facts, counsel for defendant was of the opinion during the trial that the statute of limitations ran in 1933. (Tr. 10; 15.) And, after careful study of the entire record, including the oral testimony, counsel for defendant were of the same opinion when defendant's brief was filed—see particularly page 21, lines 28-32, and page 22, lines 1-7. If at the latter stage of this litigation, if not by the time of the trial, counsel for defendant had not perceived the subtle point, predicated on Section 352 C.C.P., which he now advances for the first time, how can it in fairness be said that the guardian should have perceived it during the three months following June 23, 1941?

In the letter of March 1, 1949, from defendant's counsel to Judge Goodman, the inconsistency between defendant's brief and the position now taken is recognized. The statement is made (top of page 2) that it was "taken for granted" that the four-year statute expired in 1933. We are utterly unable to understand how counsel for defendant (or anyone) can properly accuse plaintiff's guardian with "neglect" for not taking an action in 1941 that such counsel, as late as January 14, 1949, would have necessarily regarded as a futile gesture.

Apart from the foregoing, the defendant's unfounded assertion of "failure, neglect and refusal" necessarily imputes bad faith on the part of the

guardian. This is not only unjustified and unjustifiable; indeed the law is settled to the contrary. "Good faith is always presumed until the contrary is shown by proof." (Flynn & Emrich Co. v. Federal Trade Commission, 52 F. (2d) 836, 838 C.C.A.-4, 1931); (underscoring supplied.) See, also, the strong statement in Equitable Trust Co. v. Washington-Idaho Water, Light & Power Co., 300 Fed. 601 at 617 (Dist. Ct. E. D. Wash., S. D., 1924). And the Tax Court on occasion has seen fit strongly to admonish counsel for the Commissioner of Internal Revenue not to throw doubt on the bonafides of actions of taxpayers unless he has evidence to support it. See Millard D. Olds, 15 B.T.A. 560 at 565. Compare, also, C.C.P. Sec. 1963, subdivisions 1, 4, 19, 20 and 33.

But let us assume, for the sake of the argument, that if the guardian had brought suit in 1941, he would have recovered a judgment for \$150,000. Even so, in the absence of bad faith in omitting to take such action, the deduction would nevertheless be allowable because the income tax law does not insist on infallibility of honest judgment. The very existence, in the Internal Revenue Code, of the bad debt deduction provision itself shows that. Examples are to be found in the following cases under the bad debt section: Kate I. Nixon, 2 B.T.A. 524; Cruger Co., 11 B.T.A. 306 at 308; Robert S. Dennison, 4 T.C. 806.

See, also, Section 23 (e), allowing deductions for losses. Under this provision, Treasury Regulations

111, Sec. 29.23(e)-1, provides that "A loss occasioned by damage to an automobile maintained for pleasure, where such damage results from the faulty driving of the taxpayer or other person operating the automobile, but is not due to the willful act of negligence of the taxpayer, is a deductible loss in the computation of net income." And see last paragraph of opinion of the Second Circuit in *Shearer v. Anderson*, 16 F. (2d) 995 at 997, 6 A.F.T.R. at 6485.

The omission of plaintiff's guardian to bring suit after June 23, 1941, was not "voluntary"—a word which appears near the end of the defendant's letter of March 1—in any sense which would militate against deductibility here. It may be admitted that if an action to recover would have been successful and that the guardian, knowing this, deliberately refrained from suing, the deduction would not be allowable. But there is no evidence here that brings this case within that principle; quite the contrary.

And the defendant now concedes that "the debt became worthless within the taxable year 1941." (Defendant's Conclusion of Law V, p. 5, line 1.)

Conclusion

It is respectfully submitted that the Findings of Fact and Conclusions of Law lodged by plaintiff on February 14, 1949, are adequate and should be adopted, and those lodged by defendant on March 1 should be rejected in their entirety.

It is possible, however, that in view of the present

challenge of defendant, the court may wish to adopt additional findings. For this reason possible substitutes for findings IV and X will be found in the Appendix hereto.

Dated: March 5, 1949.

Respectfully submitted,
BRADY & NOSSAMAN,
By /s/ JOSEPH D. BRADY,
/s/ WALTER L. NOSSAMAN,
/s/ JAMES L. WOOD,
Attorneys for Plaintiff.

Appendix

Suggested substitutes for Findings of Fact IV and X:

IV.

On January 1, 1941 one John Barneson was indebted in the amount of \$150,000 to plaintiff Muriel E. Barneson for cash loans in the aggregate sum of \$150,000 made by plaintiff to said John Barneson in 1928 and 1929, no part of which has ever been repaid. In his brief filed in this court on January 12, 1949, the defendant claimed that "the four-year statute of limitations for bringing suits upon an open account expired some time in 1933 as to the moneys advanced by her [plaintiff] to her father [John Barneson] in 1928, 1929." Plaintiff took the same position as defendant as to the time when the California statute of limitations had run. In his aforesaid brief the defendant, in his "Statement of Facts", also conceded and contended that Judge

Cotton's rejection of plaintiff's aforesaid creditor's claim was "Pursuant to law." The Court finds that the California statute of limitations applicable to said debt of \$150,000 ran in the year 1933.

X.

Said debt of \$150,000 did not become worthless at any time prior to February 25, 1941, the date of John Barneson's death. The estate of John Barneson was probated in the Superior Court of the State of California in and for the County of San Mateo. On June 23, 1941, plaintiff, acting through the guardian of her person and estate, filed in said probate proceeding a "Creditor's Claim" for \$150,000 covering the same two items (\$100,000 loaned in 1928 and \$50,000 loaned in 1929) as are mentioned in Finding IV above. Said claim was rejected on the same date by Honorable A. R. Cotton, Judge of said Court, on the ground that it was barred by the statute of limitations. Plaintiff did not bring suit on said claim within three months after June 23, 1941, or at all. [Stip., par. 25, p. 17].

[Endorsed]: Filed Mar. 7, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled action regularly came on for trial, without a jury, on September 28, 1948, before the Honorable Louis E. Goodman, Judge presiding,

the plaintiff in said action appearing by her counsel, Brady & Nossaman, of Los Angeles, by Joseph D. Brady, Esq. and James L. Wood, Esq., and the defendant in said action appearing by his counsel, Frank J. Hennessy, Esq., United States Attorney, and William E. Licking, Esq., Assistant United States Attorney. Having considered the pleadings, admissions, oral testimony, stipulated facts, and arguments of counsel, the Court makes and publishes the following:

Findings of Fact

The Court finds that:

Upon the trial the parties through their respective counsel duly made and filed their written stipulation of facts. As and for its findings of fact the Court adopts said stipulation, including the exhibits attached thereto, and, based upon said stipulation as supplemented by certain admissions and oral testimony, finds the essential facts to be as follows:

I.

Plaintiff, Muriel E. Barneson, was duly adjudged to be incompetent on April 3, 1936. Lionel T. Barneson has at all times since April 3, 1936 been the duly appointed, qualified and acting guardian of her person and estate.

II.

At all material times plaintiff Muriel E. Barneson and said Lionel T. Barneson were, and still are, citizens of the United States, domiciled in the State of California.

III.

Defendant is, and at all times since May 14, 1945, has been, the duly appointed and acting Collector of Internal Revenue for the First District of California.

IV.

On January 1, 1941 one John Barneson was indebted in the amount of \$150,000 to plaintiff Muriel E. Barneson for cash loans in the aggregate sum of \$150,000 made by plaintiff to said John Barneson in 1928 and 1929, no part of which has ever been repaid.

V.

Plaintiff duly filed her federal income tax return for the calendar and taxable year 1941. In that return she claimed a bad debt deduction in the amount of \$150,000 representing the aforesaid debt. Subsequently, said return was examined by the Internal Revenue Agent in Charge at San Francisco. Said official disallowed the \$150,000 bad debt deduction, made certain other adjustments, and eventually asserted, on behalf of the Commissioner of Internal Revenue, a deficiency for the taxable year 1941 of \$70,369.97. Plaintiff has not claimed and the Commissioner has not allowed any part of said \$150,000 as a deduction from plaintiff's gross income in any other taxable year.

VI.

On June 28, 1945, plaintiff paid to the defendant, as Collector of Internal Revenue, the sum of \$70,369.97, the amount of the asserted deficiency. Said

payment was made under simultaneous written protest that no deficiency was owing. Subsequently, on notice and demand from the defendant, plaintiff paid defendant, on October 18, 1945, the sum of \$13,872.52 as interest on said asserted deficiency. The amount of \$1,037.92 of the asserted deficiency of \$70,369.97, and the amount of \$204.62 of the interest of \$13,872.52 arose from adjustments other than disallowance of said bad debt deduction, and it has been stipulated by the parties in this case that plaintiff is entitled to recover such sums, with interest as provided by law, regardless of the decision as to the bad debt issue. The balance of the deficiency paid, to wit, \$69,332.05, and the balance of the interest paid, to wit, \$13,667.90, arise from the bad debt deduction disallowance.

VII.

Plaintiff duly filed an appropriate and timely claim for refund of the tax and interest above mentioned. The Commissioner failed to render a decision thereon within six months after filing or at all.

VIII.

No part of the tax or interest paid by the plaintiff, as aforesaid, has been refunded or credited or repaid.

IX.

Plaintiff commenced this action within the time and in the manner provided by law.

X.

Said debt of \$150,000 did not become worthless

at any time prior to February 25, 1941, the date of John Barneson's death.

XI.

Said debt became worthless within the taxable year 1941.

XII.

There was probable cause for the acts done by defendant James G. Smyth, Collector of Internal Revenue, acting pursuant to the orders and directions of the Commissioner of Internal Revenue.

Conclusions of Law

As Conclusions of Law from the foregoing Findings of Fact, the Court concludes that:

I.

The Court has jurisdiction of the parties and the subject matter of this action.

II.

The debt in the amount of \$150,000 heretofore referred to became worthless within the taxable year 1941 within the meaning of Section 23 (k) (1) of the Internal Revenue Code as amended.

III.

Plaintiff was legally entitled to deduct from her gross income for the taxable year 1941 the amount of \$150,000 as a bad debt.

IV.

Plaintiff is entitled to recover from the defendant the sum of \$84,242.49 together with interest as provided by law on \$70,369.97 of said amount

from June 28, 1945, and on \$13,872.52 of said amount from October 18, 1945.

V.

By reason of the probable cause for the acts of the defendant or other officials of the Treasury Department, as found by the Court, the judgment to be entered herein, upon becoming final, shall be provided for and paid out of the proper appropriation from the Treasury of the United States.

Dated: San Francisco, California, March 25th, 1949.

/s/ LOUIS E. GOODMAN,

Judge of the District Court.

Approved as to form as provided by Rule 5 (d) of this Court.

/s/ FRANK J. HENNESSY,

U. S. Atty.

/s/ C. ELMER COLLETT,

Asst. U. S. Atty.

I have rejected defendant's proposed amendments to the Findings because they raise questions properly presentable on Motion for New Trial.

March 25, 1949.

/s/ LOUIS E. GOODMAN,

District Judge.

[Endorsed]: Filed Mar. 25, 1949.

In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 27929-G

MURIEL E. BARNESON, an Incompetent Person, by Lionel T. Barneson, Guardian,
Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,
Defendant.

JUDGMENT

The above-entitled action, having regularly come on for trial, without a jury, on September 28, 1948, before the Honorable Louis E. Goodman, Judge presiding, the plaintiff in said action appearing by her counsel, Brady & Nossaman, by Joseph D. Brady, Esq., and James L. Wood, Esq., and the defendant in said action appearing by his counsel, Frank J. Hennessy, Esq., United States Attorney, and William E. Licking, Esq., Assistant United States Attorney, and the Court having considered the stipulated facts, admissions, oral evidence and arguments of counsel, and having made and filed its Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed :

(1) That plaintiff, Muriel E. Barneson, an incompetent person (Lionel T. Barneson, guardian), recover from defendant, James G. Smyth, Collector of Internal Revenue, the sum of \$84,242.49,

overpayment of federal income tax for the calendar year 1941, together with interest as provided by law on \$70,369.97 of said amount from June 28, 1945, and on \$13,872.52 of said amount from October 18, 1945.

(2) That the Court having heretofore certified, pursuant to Section 2006, Title 28, of the United States Code, that there was probable cause for the acts done by defendant, James G. Smyth, Collector of Internal Revenue, as set forth in said Findings of Fact, the amount for which judgment is herein given against said defendant shall, upon the judgment becoming final, be provided for and paid out of a proper appropriation from the Treasury of the United States.

Dated this 25th day of March, 1949.

/s/ LOUIS E. GOODMAN,
Judge of the District Court.

Entered in Civil Docket March 28, 1949.

The foregoing judgment is hereby approved as to form as provided by Rule 5 (d) of this Court.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ C. ELMER COLLETT,
Asst. U. S. Attorney.

[Endorsed]: March 25, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF PROBABLE CAUSE

It appearing to the satisfaction of the Court that the subject matter of the judgment rendered in favor of the plaintiff and against the defendant in the above-entitled action is money exacted by or paid to the defendant, and by him paid into the Treasury of the United States, the Court hereby certifies that there was probable cause for the acts of the defendant in collecting said money and paying the same into the Treasury, and that said defendant acted under the directions of the Secretary of the Treasury or other proper officer of the Government in so doing.

Dated this 25th day of March, 1949.

/s/ LOUIS E. GOODMAN,
Judge.

Approved as to form this 14th day of February, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ C. ELMER COLLETT,
Asst. U. S. Attorney.

[Endorsed]: Filed March 25, 1949.

[Title of District Court and Cause.]

NOTICE

You Are Hereby Notified that on March 28, 1949, a Decree Judgment was entered of record in this office in the above-entitled case.

San Francisco, California, Mar. 29, 1949.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the Honorable the above-entitled Court, and to Muriel E. Barneson, an Incompetent Person, by Lionel T. Barneson, Guardian, Plaintiff, and to Brady and Nossaman, attorneys for Plaintiff:

You are hereby notified that on April 18, 1949, at the hour of 10:00 o'clock a.m. on said day, or as soon thereafter as counsel can be heard, at the Court Room of the above-entitled Court, in the Post Office Building in the City and County of San Francisco, State and Northern District of California, defendant will and hereby does move the above-entitled court for its order granting new trial in the above-entitled action.

Said motion will be made on the ground that said Findings of Fact and Conclusions of Law and Judgment made herein are:

1. The decision is contrary to the law in the case.
2. The decision is contrary to the evidence in the case.
3. The decision and judgment are contrary to the law and evidence in the case.
4. The evidence is insufficient to support the decision.
5. The evidence is insufficient to support the decision, and judgment.
6. The decision is against the weight of and contrary to the evidence, and that the evidence herein compels contrary Findings, Conclusions and Judgment.
7. The decision and judgment are contrary to and against law.
8. The evidence shows that a decision and judgment should have been rendered in favor of defendant, and that the decision and judgment, as rendered, are contrary to law, and will be based on this notice, the minutes of the court, the record of the evidence herein, on the said Findings, Conclusions and Judgment made herein, and on all the

records, papers, pleadings and files in the above-entitled action.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ C. ELMER COLLETT,
Asst. U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed April 7, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
State and Northern District of California,
City and County of San Francisco—ss.

Beatrice H. Schryver, being duly sworn, deposes and says:

That her business address is 422 United States Courthouse and Post Office Building, Seventh and Mission Streets, San Francisco, California; that she is a citizen of the United States and a resident of the City and County of San Francisco; that she is over the age of eighteen years, and not a party to the above-entitled cause; that on the 7th day of April, 1949, she placed one copy of Notice of Motion for New Trial, in the above-entitled action, in an envelope addressed to Messrs. Brady & Nossaman, Attorneys at Law, 433 South Spring Street, Los Angeles 13, California, which is the office ad-

dress of the attorneys for the above-named Plaintiff, sealed said envelope, and deposited it in the United States Mail at San Francisco, California, with postage thereon fully prepaid; that there is delivery service by United States mail at the place so addressed, and regular communication by United States mail between the place of mailing and the place so addressed.

/s/ BEATRICE H. SCHRYVER.

Subscribed and sworn to before me this 8th day of April, 1949.

[Seal] /s/ E. C. EVENSEN,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed April 8, 1949.

[Title of District Court and Cause.]

STATEMENT OF PLAINTIFF'S REASONS
IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL AND LIST OF
AUTHORITIES ON WHICH PLAINTIFF
RELIES

1. A trial court is loath to grant a new trial.
3 Moore's Federal Practice,
Sec. 59.01, page 3242.
2. The court will not listen again to the arguments made prior to judgment.

Hostetter Co. v. Comerford,
99 Fed. 834, 835 (Cir. Ct., N. Y., 1900);
Pittsburgh Reduction Co. v. Cowles Electric
Smelting & Aluminum Co., 64 Fed. 125, 132
(Cir. Ct., Ohio, 1894);
Giant Powder Co. v. California Vigorit Pow-
der Co., 5 Fed. 197, 201 (Cir. Ct., Calif.,
1880).

3. As to points of law argued prior to judgment, the losing party's remedy in case of error is by appeal.

Jenkins v. Eldridge, Fed. Cas. No. 7267, p.
506 (Cir. Ct., Mass., 1845);
Giant Powder Co. v. California Vigorit Pow-
der Co., *supra*;
Champion Spark Plug Co. v. Sanders, 63 F.
Supp. 345, 346 (D.C., N.Y., 1945).

4. In submitting the case at bar for decision, defendant not only admitted but contended that the statute of limitations ran in 1933. Defendant will not now be permitted to repudiate that admission or to escape its binding effect.

King v. Edward Hines Lumber Co., 68 F.
Supp. 1019 (D.C., Oregon, 1946).

5. The defendant having tried this lawsuit on one theory, cannot obtain a new trial in an effort to retry it on a different theory, much less a wholly inconsistent one.

Colonial Book Co. v. Amsco School Publi-
cations, 159 Dept. Justice Bulletin, 6 Fed.
Rules Serv. 59 b. 1, Case No. 1 (D. C., N.

Y., 1942). (Case originally defended on theory of no infringement of plaintiff's patent; defendant unsuccessfully sought new trial on theory plaintiff had no valid patent);

Lockwood v. Cleveland, 20 Fed. 164 (Cir. Ct., N. J., 1884). (Situation parallel to Colonial Book Co. case, *supra*);

Teller v. Athens Stone Works, 9 Fed. Rules Serv. 51.33, Case No. 2 (D. C., Tenn., 1946).

6. In any event a new trial should not be granted where, as here, the judgment would be for the plaintiff even if a new theory were considered. See Plaintiff's Objections to Defendant's Proposed Amended Findings of Fact and Conclusions of Law, filed March 7, 1949, p. 8, line 22, to p. 10, line 3.

Dated: April 15, 1949.

/s/ BRADY & NOSSAMAN,
By /s/ J. D. B.,
Attorneys for Plaintiff.

[Endorsed]: Filed April 19, 1949.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION
FOR NEW TRIAL

Defendant's Motion for New Trial having regularly come on for hearing at 10:00 o'clock a.m. on the 18th day of April, 1949, Honorable Judge Louis E. Goodman presiding; and the Court hav-

ing heard and considered Defendant's Motion for New Trial, the minutes of the Court, the record of the evidence, Findings of Fact and Conclusions of Law, the Judgment, and all other records, papers, pleadings and files in the above-entitled action; it is hereby

Ordered, Adjudged and Decreed that defendant's Motion for New Trial be denied.

Dated: April 19th, 1949.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed April 19, 1949.

[Title of District Court and Cause.]

NOTICE

To: Messrs. Brady & Nossaman, 433 South Spring St., Los Angeles 13, Calif. Frank J. Hennessy, Esq., P. O. Bldg., San Francisco, Calif.

You Are Hereby Notified that on April 19, 1949, Judge Louis E. Goodman, Judge, Ordered defendant's motion for a new trial Denied.

San Francisco, California, April 20, 1949.

C. W. CALBREATH, ECE
Clerk, U. S. District Court.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendant James G. Smyth hereby appeals to the United States

Court of Appeals for the Ninth Circuit from the final judgment entered by the United States District Court for the Northern District of California, in favor of Plaintiff and against said defendant on March 28, 1949, and from the Order Denying defendant's Motion for New Trial by said Court on April 19, 1949.

Dated: May 19, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed May 27, 1949.

[Title of District Court and Cause.]

NOTICE

To: Messrs. Brady & Nossaman, 433 South Spring St., Los Angeles 13, Calif.

You Are Hereby Notified that on May 27, 1949, a Notice of Appeal was filed by Defendant in the above-entitled case. A copy of which is enclosed herewith.

San Francisco, California, May 31, 1949.

C. W. CALBREATH, ECE
Clerk, U. S. District Court.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE ON APPEAL

The defendant herein having on May 19, 1949, duly filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered by the United States District Court for the Northern District of California in favor of plaintiff and against said defendant on March 28, 1949, and from the order denying defendant's motion for a new trial by said Court on April 19, 1949, now, upon application of said defendant and appellant, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and good cause appearing therefor,

It Is Hereby Ordered that said defendant and appellant have and is hereby given to and including August 17, 1949, for filing the record on appeal and docketing the cause with said Appellate Court.

Dated: June 21, 1949.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed June 21, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH THE
DEFENDANT INTENDS TO RELY ON
APPEAL

Defendant hereby designates the following as the points on which he intends to rely in the Appeal of said Cause to the United States Court of Appeals for the Ninth Circuit, this Designation to be filed with the Transcript of Record:

1. The District Court erred in making and adopting its Finding of Fact numbered IV in that said finding of fact is contrary to the evidence and is not supported by any substantial evidence in the record.

2. The District Court erred in failing to find as a fact that John Barneson was not indebted to plaintiff Muriel E. Barneson for any amount on January 1, 1941, or at any other time during the year 1941.

3. The District Court erred in making and adopting its Findings of Fact numbered X and XI in that said findings of fact are not supported by any substantial evidence before the Court and are contrary to said evidence.

4. The District Court erred in failing to find that any debt of John Barneson to Muriel E. Barneson, the plaintiff, that may have existed became barred by the Statute of Limitations and worthless prior to the commencement of the taxable year 1941, or has by reason of the insanity of Muriel E. Barneson and the consequent tolling of the ap-

plicable statute of limitations never become worthless.

5. The District Court erred in drawing its Conclusion of Law numbered II in that said conclusion is not supported by the evidence or by the facts found by the Court.

6. The District Court erred in failing to conclude that as a matter of law the debt in the amount of \$150,000.00 which it had found as fact to be due from John Barneson to Muriel E. Barneson, the plaintiff, was voluntarily allowed to become outlawed and worthless by the inaction and failure of Muriel E. Barneson or Lionel T. Barneson, her guardian, to press for its payment by the debtor or his estate who were at all times solvent and abundantly able to pay the obligation, and said debt therefore did not qualify as a worthless debt within the meaning and intent of Section 23(K) (1) of the Internal Revenue Code as Amended.

7. The District Court erred in drawing its Conclusion of Law numbered III in that it should have concluded that as a matter of law plaintiff was not legally entitled to deduct the amount of \$150,000.00 or any sum from her gross income for the taxable year 1941 as a bad debt when she, or her guardian, Lionel T. Barneson, had caused or contributed to the debt's worthlessness by voluntarily refraining from enforcing its payment when due by a solvent debtor abundantly able to satisfy the obligation.

8. The District Court erred in drawing its Con-

clusion of Law numbered IV in that the evidence before the Court and the facts found by it do not support a conclusion that plaintiff is as a matter of law entitled to recover any sum from the defendant in excess of \$1,242.52.

9. The District Court erred in rendering judgment against the defendant for any sum in excess of \$1,242.52 with interest thereon as provided by law.

Dated: July 29, 1949.

/s/ FRANK J. HENNESSY,

U. S. Attorney.

/s/ C. ELMER COLLETT,

Assistant U. S. Attorney, Attorneys for Defendant-Appellant.

[Endorsed]: Filed Aug. 2, 1949.

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

To: the Clerk of the above-entitled Court, and to Messrs. Joseph D. Brady and Walter L. Nossaman, Attorneys for Plaintiff:

The defendant above, by its attorneys, hereby designates for inclusion in Transcript of Record upon Appeal the entire record before the District Court, including the following:

1. Complaint. (Filed 2-25-48.)
2. Answer. (Filed 5-11-48.)
3. Stipulation of Facts, including Exhibits A, B, B-1, C, D, E, F, G, H, attached thereto. (Filed 9-24-48.)
4. Stipulation to Correct Reporter's Transcript. (Filed 10-29-48.)
5. Reporter's Transcript. (Filed 11-9-48.)
6. Order for Judgment. (Filed 2-8-49.)
7. Order of Court. (Filed 2-18-49.)
8. Plaintiff's Objections to Defendant's Proposed Amended Findings of Fact and Conclusions of Law. (Filed 3-7-49.)
9. Letter of Joseph D. Brady. (Filed 3-9-49.)
10. Findings of Fact and Conclusions of Law. (Filed 3-25-49.)
11. Defendant's Proposed Amended Findings of Fact and Conclusions of Law. (Lodged 3-1-49.)
12. Judgment. (Filed 3-25-49.)
13. Certificate of Probable Cause. (Filed 3-25-49.)
14. Notice of Entry of Judgment. (Dated 3-29-49.)
15. Notice of Motion for New Trial. (Filed 4-7-49.)
16. Affidavit of Service of Notice of Motion for New Trial by Mail. (Filed 4-8-49.)
17. Notice of Denial of Motion for New Trial. (Dated 4-20-49.)
18. Statement of Plaintiff's Reasons in Opposition to Defendant's Motion for New Trial. (Filed 4-19-49.)

19. Order Denying Defendant's Motion for New Trial. (Filed 4-19-49.)
20. Notice of Filing Notice of Appeal. (Dated 5-31-49.)
21. Notice of Appeal. (Filed 5-27-49.)
22. Order Extending Time to File Record and Docket Cause on Appeal. (Filed 6-21-49.)
23. Statement of Points Intended to Be Relied Upon on Appeal.
24. This Designation.

Dated: August 2, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant-
Appellant.

[Endorsed]: Filed Aug. 2, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 27,929-G

LIONEL T. BARNESON, Guardian of Muriel E.
Barneson,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,
Defendant.

REPORTER'S TRANSCRIPT

Tuesday, September 28, 1948

Appearances:

JAMES D. BRADY and

JAMES L. WOOD,

For the Plaintiff.

WM. E. LICKING,

For the United States. [1*]

Before: Hon. Louis E. Goodman, Judge.

The Court: Proceed, Counsel.

Mr. Brady: I am Joseph D. Brady, and my associate is James L. Wood. As you will see from the papers just handed to your Honor, Mr. Licking and counsel for the plaintiff have worked out a very carefully prepared stipulation of facts. We expect to have just one witness. The case is a Federal Income Tax case of Muriel E. Barneson, who

* Page numbering appearing at top of page of original Reporter's Transcript.

is an incompetent. The year involved is the year 1941. In Miss Barneson's 1941 return, she claimed a bad debt deduction of \$150,000. While her gross income was large, it was less than \$150,000, so that on her tax return there was no tax liability.

The Commissioner of Internal Revenue, after examination of that return, made three or four adjustments in gross income, on the deductions; all of them were of a minor character except the bad debt deduction. The Commissioner disallowed the \$150,000 bad deduction, and all the adjustments taken together produce an asserted deficiency for the year 1941 of some \$70,300.

The plaintiff chose to pay the tax with interest, and to file a claim for a refund. All those things were done. The Commissioner did not act upon the claim for a refund, to allow or disallow it within the six months provided in the Internal Revenue Code; and hence we brought this action.

The stipulation of facts contains one or two paragraphs near the end in which the parties dispose of two minor issues. The plaintiff abandoned one issue, and the Government has [2] conceded that Miss Barneson is entitled to an adjustment in her favor of some \$1,606 in net income, which automatically entitles her, as paragraph 28 of the stipulation on page 20 shows, to a judgment in her favor for some \$1,200—I beg your pardon, your Honor, that is paragraph 31, on page 21, some \$1292, together with interest, even if your Honor, much to the chagrin of plaintiff's counsel, should rule the

Commissioner was right on the disallowance of the bad debt.

Now, we have narrowed the issue down to the bad debt deduction. That involves questions of fact. I think that the law is very clear. The Internal Revenue Code as in effect for this taxable year 1941, by an amendment in 1942 Revenue Act, which was made retroactive, permits taxpayers to take deductions for "debts which become worthless within the taxable year"; so the plaintiff must prove of course that on January 1, 1941, the first day of our taxable year, a debt was owing to this plaintiff, that it was a subsisting debt on that date, and that it had value on that date. In other words, that it had not become worthless on December 31, 1940, or in some prior year.

We have to go further and we have to show that, assuming that there was a subsisting debt on January 1, 1941, it became worthless during the calendar year and taxable year 1941.

The Court: In 1941, any debt, whether business or otherwise, demonstrated to be worthless could be deducted?

Mr. Brady: That is right, your Honor. [3]

The Court: Is that equally true in the case of losses through——

Mr. Brady: True of what?

The Court: Of business losses?

Mr. Brady: The capital gains and losses, yes.

Mr. Licking: Business losses incurred during the entire year.

The Court: That is not pertinent now. Go ahead.

Mr. Brady: I just want to observe, under this case, that the facts which are admitted in evidence, the stipulation of facts alone, I think your Honor is bound to conclude Miss Barneson could not, under the facts and the law, have claimed a deduction for this \$150,000 in any prior taxable year to ours.

I think your Honor will conclude she had a valid subsisting debt, and it was valuable because, among other things, the stipulation states flatly at all times from the dates in 1928 and 1929 that Miss Barneson transferred this \$150,000 to her father, and her father at all times had the requisite financial ability to have paid Miss Barneson \$150,000 on demand; so we don't have any question of a bad debt resulting from the financial inability of the debtor to pay.

The Court: I don't quite get that.

Mr. Brady: Will you let me expand that?

The Court: Did the debt consist of some money the plaintiff had loaned? [4]

Mr. Brady: We claim it is a loan. In deference to the Government, they may suggest that the character of the money was not a loan. I will defer that to the point which I think your Honor wants to know——

The Court: What is the issue?

Mr. Brady: We claim the debt became worthless because it was barred by the California four-year statute of limitations. John Barneson died February 25, 1941, in this taxable year.

The Court: He was the man that owed the money.

Mr. Brady: He was the man that owed the money—we claim he owed money. He died.

The Court: The Barneson that was in the oil business?

Mr. Brady: That is right, Captain John Barneson.

The Court: Lived down on Central Avenue, didn't he?

Mr. Brady: I do not know. I am from Los Angeles.

Mr. Licking: That is correct, your Honor.

The Court: I remember when I was first married, that is, the first year of my marriage, I lived in a house owned by my wife's parents on Central Avenue. The fact is, if I recall correctly, Barneson lived a few houses away in that street.

Mr. Licking: That is my understanding. It is hearsay as far as I am concerned, but I believe that is right.

The Court: Muriel is a daughter of John Barneson.

Mr. Brady: Muriel is a daughter of John. Muriel is not present, and she is the creditor. John Barneson was the [5] debtor.

Mr. Licking: So you contend.

The Court: What is the issue? As to whether there was a debt, and as to whether it became worthless also?

Mr. Brady: That is right, two issues.

The Court: Are you going to produce any evidence besides the stipulation?

Mr. Brady: Yes, we are going to call Lionel Barneson who is the guardian of Muriel.

The Court: Why don't you do that?

Mr. Brady: I think it would be better if I could relate some of the facts stipulated there.

Miss Barneson has been adjudicated incompetent since April 3, 1936. She can't be here. She couldn't testify if she were physically present; actually, as Lionel Barneson will show, she became actually incompetent in March of 1931.

Mr. Licking: Mr. Brady—as you will offer to show by Lionel Barneson.

Mr. Brady: I can't hear.

Mr. Licking: As you will offer to show, rather than you will show.

Mr. Brady: Yes, that can be taken as implicit in anything I may say here.

Back in 1928, Harold Barneson, a brother of Muriel and Lionel Barneson, was in the stock brokerage business in San [6] Francisco and Los Angeles doing business as H. J. Barneson & Company. In 1928 and 1929 his stock brokerage business was expanding and he needed working capital; so he appealed to his father for some money in 1928. His father transferred \$300,000 to Harold Barneson for use as working capital in the stock brokerage business. Of that \$300,000 capital, Captain Barneson got \$100,000 from Muriel, this plaintiff, and another \$100,000 from his wife Harriet, who died in 1936; and the third \$100,000 he got out of his own bank account; so that in 1928 Captain Barneson transferred \$300,000 to Harold Barneson.

The checks which Muriel wrote to her father on her bank account, which he cashed and deposited in his bank account, as the stipulation of facts shows, are in the exhibit which is attached to the stipulation; and also the fact should be there is enough on those check stubs, notations made by Muriel at the time, which encourage the Government to suggest that, as I believe, the relationship between Muriel and Harriet and John Barneson was not debtor and creditor, but they were some sort of special partners, having a piece of an interest in Harold Barneson's interest in that stock brokerage business.

The Court: How much did these checks of Muriel amount to, that Muriel Barneson wrote?

Mr. Brady: All-told in 1928 and 1929, \$150,000.

The Court: That is the \$150,000.

Mr. Brady: In 1929 she gave another \$50,000 and in 1929, [7] Harriet, the mother, gave another fifty, and in 1929, John Barneson of his own money transferred \$25,000. It ended up at the end of 1929 there had been an aggregate transferred by John Barneson to Harold Barneson of \$425,000, of which 150,000 he had got from Muriel, 150,000 from Harriet his wife, and 125,000 came out of his own bank account.

It is this relationship between Muriel and Harriet on the one hand, and John on the other hand, whether that is a debtor-creditor relationship, whether the three of them were some sort of partners—that I think is one of the factual issues in this case.

Of course, the Government, I think it is reasonable to assume they will argue it was not a debtor-creditor relationship between John Barneson and Muriel, or between John and Harriet.

The Court: Who do you claim is the creditor and who is the debtor? Harriet Barneson?

Mr. Brady: No, your Honor. We claim that John Barneson was indebted to his wife for \$150,000, and that he was indebted to his daughter Muriel for \$150,000; but the relationship was solely between them.

The Court: And you claim the statute ran on that, and therefore in 1941 it became a bad debt.

Mr. Brady: Yes. As I say, John died in 1941. Lionel Barneson, as the guardian of Muriel, filed in the probate proceeding down in Redwood City in John Barneson's estate a [8] creditor's claim on behalf of Muriel for \$150,000, and a copy of that is in the stipulation of facts, your Honor. Martin Weil was acting as Lionel's attorney in Lionel's capacity as the executor of John Barneson's will.

Shortly following, as we will show by proof, upon John Barneson's death, Lionel and Martin went over John Barneson's books of account down in the Barneson building on Montgomery Street; and Lionel called Martin's attention to an account on John Barneson's books.

I wish your Honor would at this time turn to it; it is Exhibit "A" to the stipulation of facts; wherein John Barneson, the debtor, recognized his debt to his daughter Muriel in the amount of \$150,000 and you will observe that he got \$100,000 of it

in May of 1928 and another \$50,000 in May of 1929.

When Mr. Barneson called that to the attention of Martin Weil, Martin as a lawyer said, "I think that claim is barred by the statute of limitations. It is more than four years old." Nevertheless the claim was filed with Judge Cotton.

The Court: In 1941?

Mr. Brady: On June 23, 1941.

The Court: Disallowed?

Mr. Grady: It was disallowed on that date.

The Court: On the ground it was barred by the statute?

Mr. Brady: That is right, and it was further stipulated, your Honor—it is in the stipulation showing that John Barneson—— [9]

The Court: It was barred by the statute away back in 1933.

Mr. Brady: That is right, your Honor. So far as we can tell, there was no basis for contending that the statute of limitations was suspended.

Mr. Licking: There was some barred in 1932, according to the stipulation.

The Court: Then the real question is, "Is a debt in existence in 1928-1929, becoming outlawed in 1933, the debtor dying in 1941, the claim being presented to his estate in 1941 and being disallowed, when if at all is it that the debt becomes worthless"?

Mr. Licking: That assumes a point—it was a debt.

The Court: Yes.

Mr. Brady: If it is a debt. I think your Honor

has phrased the issue. In connection with the loan, we have a four-page memorandum of points and authorities, or an outline thereof. The decisions have uniformly held——

The Court: I rather you didn't argue the legal aspects of the case, because of the fact that my time is so limited in the pile of cases, because of the heavy calendar. I would rather have you put on whatever evidence you have.

Mr. Brady: May I avert to one further fact in the stipulation of facts. I think you will understand the testimony better if I do. If your Honor will turn to Exhibit "F" to the stipulation of facts, there is the "Harriet E. Barneson [10] Loan Account." You will see on the credit side two entries; they are almost identical with the entries on the Muriel Barneson Loan Account on Exhibit "A." On the debit side of the Harriet Barneson Loan Account, you will see entries showing, following the death of Mrs. Barneson in 1936, Captain Barneson recognized the debt, as shown by his books, by making a payment to her estate.

As you read the stipulation of facts, you will conclude that the relation between Muriel Barneson and her father with reference to Muriel Barneson's \$150,000 was identical to the relation between Harriet Barneson and John Barneson with respect to Harriet's \$150,000. We say the evidence shows conclusively that Captain John Barneson recognized on his own books his debts to both of these people; and the fact he recognizes them meets the statute of

limitations, by paying the debt to his wife's estate, even though that was barred by the statute of limitations.

Admittedly, Harriet Barneson is dead, John Barneson is dead, Harold Barneson is dead, and Muriel Barneson is incompetent, so that we can't have the benefit of that testimony they might give.

Mr. Licking: Harold? You say Harold is dead?

Mr. Brady: Harold is dead. The stipulation states that. If your Honor wishes, I will call my witness.

Mr. Licking: I think from the statement by the plaintiff [11] here that the Government's position on the matter is outlined properly. Our contention, first, is that this was not in the ordinary sense of the word a debt, but that it is, as the evidence shows, and the facts in the stipulation of facts particularly shows here, to some extent it is a joint venture, an interest of joint venturers in the interest of John Barneson on account of advances made to the brokerage firm run by his son, to which the funds were advanced, including the sums from his wife Harriet, the \$150,000 here, and the \$125,000 he advanced out of his own funds.

The stipulation of facts shows that this was carried, as far as John Barneson was concerned, in a separate account. That is, there was another account with reference to Muriel, and that account had entries in it from time to time, after her incompetency and before that time; and this particular account which we, for the purposes of argument,

how a partnership account, or where it is not so set out, is at least set out in the books as a separate account.

In other words, there were two accounts carried in the books with Muriel Barneson. For that reason, if a debt, it is an unusual debt; and we feel that it is evidence of a joint venture between John Barneson, Harriet Barneson, and Muriel in the proceeds of John Barneson's interest in the brokerage firm; and, second, we contend that——

Mr. Brady: Do you mean John Barneson's interest in the [12] brokerage firm?

Mr. Licking: Yes, a joint venture of the three of them as to John Barneson's interest and participation in that interest.

The Court: Is there evidence as to the nature of John Barneson's relation?

Mr. Licking: There is evidence John Barneson himself was given a special partnership interest in this brokerage firm, to be advanced the money. There is evidence in the stipulation he was to participate in the profits.

The Court: Is there any dispute about the fact that John Barneson was not a creditor of Harold Barneson? Is that disputed? As far as John Barneson's relationship to the son was concerned, that was or that was not a creditor relationship?

Mr. Licking: John Barneson claimed a loss of the total amount of \$425,000 on one of his income tax returns for the year 1932. That was the year when the brokerage firm went sour.

The Court: Is that allowed or not?

Mr. Licking: That was allowed, your Honor. It was never questioned. In that year he had a loss without it. He wouldn't have had any taxable income if the \$425,000 was not allowed, and it was not questioned.

The Court: Of course, it would have been a loss to him even if he was a special partner. [13]

Mr. Licking: That is true.

The Court: Yes, go ahead. I think I have got that.

Mr. Licking: Now, covering that, we contend that the loss or the investment, that this was an investment in a joint venture with John Barneson in the business of a stock brokerage firm—not that Muriel had anything to do with it, not that Muriel Barneson was a partner in this brokerage firm; but she, Harriet and her father were partners in the investment of this money.

The Court: That would be inconsistent with this claim he lost \$425,000 in the business, wouldn't it?

Mr. Licking: It would.

The Court: Ostensibly it would be inconsistent with that.

Mr. Licking: It would be inconsistent. It would be inconsistent in one sense, and he might still have guaranteed it. He might still have underwritten the investment himself personally; but at any rate, the facts show that it was not treated by him in his own bookkeeping system as his other accounts and other dealings with Muriel.

Now, Lionel Barneson, who was the executor of the estate of Harriet, and he served as the executor of the estate of John Barneson and also as the guardian of the plaintiff here, Muriel Barneson; acting under the law of the State of California, he is required to file an inventory of the assets of the estate of the incompetent. That inventory was filed within proper time, [14] apparently, after that declaration of incompetency; and while it contained much of the other assets in the estate of Muriel, other claimed assets, it contained no mention of this \$150,000.

Each year since that time and up to the present, and up to the time of the filing of a claim in this estate, there was never any mention in the annual inventory of the estate filed of this particular claim.

Now, this claim became, there is a conflict as far as the cases are concerned, probably not resolved definitely one way or the other as to the exact meaning of what "became worthless" means. I will leave that for later, but the facts are that this claim, of whatever nature it was, if it was filed as an open book account, became worthless four years after the last payment or the last entry in that connection; and that so far as the books show, of John Barneson, there was no entry in this connection in this particular account subsequent to 1932.

It shows, however, that he divided it from the time his interest arose, and this money was transferred to the brokerage firm. The facts show he divided with Muriel and Harriet the proceeds which

he received each year from his investment in his interest in the brokerage firm. He divided those with Muriel and Harriet each year, proportionately to their respective investment of each of them in the partnership, if it be regarded as a partnership investment. [15]

The Court: Does that appear in the stipulation?

Mr. Licking: That appears in the stipulation.

Mr. Brady: If I might clarify one or two points on that.

We do not contend John Barneson never had some sort of relation with Harold Barneson which constituted John a special partner of Harold, the res being Harold Barneson's interest in the H. J. Barneson Company. However, the stipulation of facts show that as far as the H. J. Barneson & Co., John was not a member of that stock brokerage partnership during 1928 or 1929. However, they do further show that on January 1, 1930, the H. J. Barneson Company became a limited partnership, and that John became a limited partner with the contribution of \$275,000, out of the \$425,000 that he had previously transferred to Harold. That difference between \$275,000 and \$425,000 was assigned by John to his son J. Leslie, who became a general partner in H. J. Barneson & Co., a limited partnership; so that John used all of that \$425,000 there.

Now, John remained a limited partner until Walsh and O'Connor, and H. J. Barneson & Co., merged or consolidated in December of 1930. John remained a limited partner in Walsh O'Connor &

Barneson to the extent of \$275,000.

Now, it is true, as Mr. Licking said, H. J. Barneson stock-brokerage company went out of business with complete losses to all the proprietary partners in 1932. John Barneson on his 1932 return took a deduction as a loss for the entire \$425,000, even though he had other losses in excess of his [16] income; so he got no tax benefit from taking \$425,000 as a loss, but that was the amount of his investment, as shown by his books.

On the other hand, Muriel Barneson filed a 1932 tax return, on which she paid a tax of between eleven and twelve thousand dollars; and she did not take any loss deduction with reference to this stock brokerage enterprise. Now, however, as the Government contends, John and Harriet——

Mr. Licking: This is straight argument at this point. It has nothing to do with the statement of facts.

The Court: That is what I have suggested to you. The time is running short. Get whatever evidence you want in the record, plus the stipulation of facts, and then you can argue to your hearts content about it.

LIONEL T. BARNESON

called as a witness on behalf of the plaintiff sworn.

Direct Examination

By Mr. Brady:

Q. Where do you reside, Mr. Barneson?

A. 126 San Carlos, Sausalito.

(Testimony of Lionel T. Barneson.)

Q. You are the guardian of the person and estate of your sister, Muriel Barneson?

A. Yes.

Q. The plaintiff here? A. Yes. [17]

Q. Muriel Barneson will be 62 years of age next month? A. Yes, sir.

Q. When did—where is Muriel Barneson now?

A. Santa Barbara.

Q. She is attended by nurses? A. Yes.

Q. She would be unable to appear here and testify? A. No, she couldn't.

Q. She couldn't testify?

A. No, she couldn't.

Q. When did Muriel's mental illness begin?

Mr. Licking: If the Court please, that calls for an opinion of this witness on a question he is not competent to answer. He was asked the question "When did Muriel's illness begin"? I do not think he is competent.

The Witness: Your Honor, I think I can answer. It happened very suddenly.

Mr. Licking: I object to the question on the ground it calls for the conclusion and opinion of this witness.

The Court: Has there been any legal proceedings?

Mr. Brady: Yes, the stipulation of facts shows that she was adjudicated incompetent April, 1936. Mr. Barneson knows she became incompetent five

(Testimony of Lionel T. Barneson.)

years before that, and I want to have him testify to it.

Mr. Licking: I doubt that—— [18]

The Court: What is the materiality of that to this case? Does the fact that this plaintiff became incompetent in fact before she was adjudicated have any bearing upon the issues of the case?

Mr. Licking: I can't see how this witness can testify to it.

Mr. Brady: It has a bearing on this. The Government is going to argue, your Honor, neither Muriel nor her guardian ever made any demand on John Barneson for the payment of this debt. They are going to make whatever capital they can. Now, if in fact, Muriel was a sick person, actually incompetent, in March, 1931, on, your Honor can weigh that fact in your ultimate conclusion.

Mr. Licking: If that is a fact, it can be proven by competent testimony. Certainly if she was incompetent during that period she was attended by some physician or physicians who could testify to her mental situation.

The Court: I do not think that is a good objection. I know there are any number of California authorities to the effect that neighbors can testify to their opinion as to the sanity or insanity of a person.

Mr. Licking: As to their opinion as sanity or insanity; this witness was asked for a fact.

The Court: You can question him as to his opin-

(Testimony of Lionel T. Barneson.)

ion, and develop their relationship. Did she live with him, and [19] so forth?

Q. (By Mr. Brady): Mr. Barneson, were you in Santa Barbara on the day in March of 1931, that Muriel Barneson was seized with some sort of mental attack? A. Yes, I was.

Mr. Licking: I object to that as leading and calling for the opinion of the witness on a question he is probably not competent to discuss.

The Court: Well—did this sister live with him from 1931 on? Did he visit her, or not? What was their relationship?

Mr. Brady: He visited her.

The Court: I will overrule the objection. Let him answer the question.

Q. (By Mr. Brady): Have you got the question?

The Witness: Yes, I answered the question.

(Last question read by reporter as above reported.)

The Witness: March, 1931, and I was there, yes.

Q. (By Mr. Brady): Has Muriel ever been able to carry on her own personal business affairs since that time? A. No.

Q. You were appointed guardian April 3, 1936?

A. Yes, I was.

Q. By the Superior Court of Ventura County?

A. Yes. [20]

Q. And you have continued as guardian ever since April, 1936? A. Yes, I have.

(Testimony of Lionel T. Barneson.)

Q. Your attorney in this guardianship matter was Mr. Blackstock of Oxnard? A. Yes.

Q. Mr. Blackstock, he has in the last two years become a judge of the Superior Court?

A. Yes.

Q. Between March, 1931, and April, 1936, who handled Muriel's affairs for her?

A. My mother handled them under a power of attorney.

Q. Did Muriel ever make a will?

A. Yes, she did.

Q. Do you know the approximate date it was executed?

A. It was executed on May 31, 1930. I am going to have to correct my previous answer. The will was 1930. The day she was seized was 1931.

Q. I couldn't hear you.

A. The will was signed in 1930. The day she was seized with this attack was March, 1931.

Q. Do you want to check it?

Mr. Licking: It seems to be entirely immaterial whether she made the Will——

The Witness: This is photostated.

The Court: I can't see the materiality, but it appears to be harmless. [21]

Q. (By Mr. Brady): Are you named as executor in that Will? A. Yes.

Q. And your mother died April 14, 1936?

A. Yes.

Q. And the executors of your mother's estate

(Testimony of Lionel T. Barneson.)

were yourself, your brother Leslie, and the Bank of California? A. Yes.

Q. Where did you reside at the time your mother died?

A. In Burlingame with my mother and father.

Q. You lived with them, did you?

A. In the house with them, yes.

Q. And you had come up here from Los Angeles in 1935 in order to take care of your mother and father? A. Yes.

Q. And you continued to live in your father's household from 1935 until after the date of his death in February, 1941? A. Yes.

Q. Your mother's estate was probated in San Mateo County? A. Yes.

Q. Did you have any conversation with your father during the time the inventory of your mother's estate was in the course of preparation as to any assets your mother owned at the date of her death?

Mr. Licking: To which I object as immaterial and hearsay.

Mr. Brady: I promise your Honor I will connect it up. [22]

Mr. Licking: What is the purpose of it? It is in the stipulation.

The Court: Whether he had a conversation or not, if he had one, it is harmless. He asked if he had a conversation with his father concerning the assets of his mother's estate. I will overrule the objection.

(Testimony of Lionel T. Barneson.)

The Witness: Yes.

Q. (By Mr. Brady): Did your father tell you at that time he was indebted to your mother's estate?

Mr. Licking: To which I object on the ground it is hearsay and immaterial.

The Court: How are you going to get in the conversation of that nature into the record in this case? How are you going to avoid the rules of evidence?

Mr. Brady: If your Honor please, the stipulation of facts, if you have a chance to observe it, ties in this \$150,000 that John Barneson borrowed from his wife with the \$150,000 borrowed from Muriel; and we want to show John admitted to Lionel, admitted as one of the executors of Harriet's estate, he owed his wife's estate \$150,000.

Mr. Licking: The facts are it was paid.

The Court: You have already called my attention to one of the exhibits here, one of the ledger sheets of John Barneson, which shows that he paid the \$150,000 into his wife's estate, as a credit against the obligation of \$150,000 which showed up on the opposite side of the ledger. I think that the conversation [23] would be subject to the objection.

Mr. Brady: In the same conversation I want to prove John Barneson said he also owed Muriel \$150,000.

Mr. Licking: I am objecting to that if the Court please.

Mr. Brady: I haven't asked him the question. I have been dividing up my questions.

(Testimony of Lionel T. Barneson.)

The Court: Now, how are you going to get that into the record? A conversation with the father saying he owes the daughter \$150,000.

Mr. Brady: I think that is perfectly admissible, your Honor, as evidence of a debtor admitting the debt—not only admitting the debt, but saying he was going to pay it.

Mr. Licking: I will make the same objection to that I made to the other, hearsay, your Honor.

The Court: Of course, it is hearsay, because it is a statement made by someone *who not* a party to this litigation, which is between the plaintiff and the United States.

Mr. Brady: Yes, but I do not think the hearsay rule applies in favor of the *United in* such a situation, your Honor. In any bad debt case, you have to prove the existence of the debt. If the debtor admits he owes a debt, if he mentions the debt and admits he intends to pay it, in the latter, the admission goes to the question of the value of the debt; and we expect to show that this debt owed by John Barneson to Muriel existed over into the taxable year 1941, especially in [24] view of the Government's contention that the relationship between John and Muriel——

The Court: I will admit the testimony, subject to a motion to strike. Let us see when we get all through how much bearing that has on the case. He wants to know what conversation you had with your father, and where was it, and who was present,

(Testimony of Lionel T. Barneson.)

first, on the subject of any alleged debt by your father to Muriel?

The Witness: I took an inventory——

Mr. Brady: The question was directed, first, to the alleged debt to Harriet, first.

The Court: Well, all right.

The Witness: I took an inventory——

The Court: Was it in the same conversation?

Mr. Brady: Yes.

The Court: All right.

The Witness: I took an inventory of my mother's estate down to my father, after she had passed away, and showed it to him.

Mr. Licking: About when was this?

The Court: Fix the time of the conversation and the place and who was present.

The Witness: That was shortly after my mother's death.

The Court: How soon after? [25]

The Witness: I would say within three weeks.

The Court: And where?

The Witness: The conversation took place in my father's bedroom in a house in Hillsborough.

The Court: Who was present?

The Witness: My father and I.

The Court: Go ahead. You may state the conversation.

The Witness: I showed him this inventory, and he said in addition to that he owed mother \$150,000, "and I owe Muriel \$150,000. I will have to pay

(Testimony of Lionel T. Barneson.)

mother because I believe under the law the executor has to sue for all moneys due, if they are not paid," and he said he would pay this and he would like to pay Muriel at the same time—he intended to pay Muriel, but it would reduce his income considerably, and he would prefer to defer it, and what did I think? Should he pay it now or later?

I told him Muriel's income was sufficient to meet her needs, she didn't need the money, and if he needed the income, I felt quite sure he did, I didn't see any reason to pay it at this time.

Q. Mr. Barneson, following the conversation which was referred to, did you examine John Barneson's book of account? A. Yes, I did.

Q. Following your——

The Court: This is already in the record covered by [26] stipulation?

Mr. Brady: That is right, but I want to know each time that he examined John Barneson's books——

The Court: Isn't that in the stipulation, too?

Mr. Licking: I stipulated it was in there. I don't know when he saw them.

The Court: We will take a brief recess and then proceed.

(Thereupon a recess was taken.)

(After Recess.)

LIONEL T. BARNESON

a witness sworn on behalf of the plaintiff, testified further as follows:

(Testimony of Lionel T. Barneson.)

Direct Examination
(Continued)

By Mr. Brady:

Q. I understand the last answer, Mr. Barneson in this conversation which you had with your father, he told you that he owed your mother \$150,000, and would have to pay her executor; and he owed Muriel \$150,000, and expected to pay her; and then he has this talk about whether he should pay her right then or later? A. That is correct.

Q. Did your father tell you where the debts to Harriet and Muriel he just referred to were evidenced?

A. No, he did not. I went up and asked Mr. Peterson, his bookkeeper, to show me the books.

Q. Did you find it?

A. I found this \$150,000 he [27] owed mother, and the \$150,000 he owed Muriel.

Mr. Licking: I can't hear.

The Witness: I found the one hundred fifty he owed mother, and the one hundred fifty he owed Muriel; and he owed mother another amount slightly under eight thousand dollars.

Q. (By Mr. Brady): In a different account?

A. In a different account.

Q. With Harriet E. Barneson? A. Yes.

Q. Was this account you found, under which John Barneson owed Muriel \$150,000, the same debt upon which in 1941 you filed a creditor's claim against John Barneson's estate?

(Testimony of Lionel T. Barneson.)

A. Yes, it was.

Q. Now, this balance due your mother's estate was something slightly less than \$8,000—did you include that as an asset in the Federal Estate Tax return of your mother? A. Yes.

Q. And pay a tax on it? A. Yes.

Q. And you also included as an asset of your mother's estate, the \$150,000? A. Yes.

Q. That your father owed her? A. Yes.

Q. On the Harriet E. Barneson loan account?

A. Yes.

Q. And paid a tax on that? A. Yes.

Q. Is Exhibit "F" to the stipulation of facts a photostatic copy of the Harriet E. Barneson loan account you found in your father's books of account, following your conversation with him?

A. Yes, it is.

Mr. Licking: Now, here——

Q. (By Mr. Brady): In what manner did your father pay your mother's estate that \$150,000?

Mr. Licking: To which I object upon the ground the question is immaterial. We have stipulated it was paid.

The Court: It shows in the ledger sheet how it was paid.

Mr. Licking: Yes. What is the materiality of the manner in which it was paid?

Mr. Brady: If your Honor please, Captain Barneson paid that debt by parting with securities, the

(Testimony of Lionel T. Barneson.)

income of which he needed; and I think that that special fact is important and material in this income tax case, because in a bad debt deduction case, the good faith of the debtor is important, when the debt itself is barred by the statute of limitations.

The Court: That only applies to the debt to Harriet Barneson, inasmuch as he didn't pay the \$150,000 to his daughter. It wouldn't make any difference how he paid some [29] other debt, would it? I don't quite get the effect of your question.

Mr. Brady: The very fact he paid the mother \$150,000, automatically reducing his income to a point where he preferred to delay the payment of Muriel——

Mr. Licking: I object to that. That is argument.

The Court: You can make that as an argument, and the witness has already testified to a conversation; and the record shows he sold 400 shares of Bank of California stock.

Mr. Licking: What was the question?

The Court: He asked the witness how his father paid it; and I call attention to the fact that the record shows, the stipulation of facts, shows how he paid it.

Mr. Licking: Yes.

Q. (By Mr. Brady): Will you turn to Exhibit "A," the stipulation of facts, Mr. Barneson. You saw the original of that account in your father's

(Testimony of Lionel T. Barneson.)

books of account when you examined them shortly after your conversation with your father in Hillsborough following your mother's death?

Mr. Licking: To which I object on the ground it has already been asked and answered, that identical question. He has identified this.

Mr. Brady: We can get along faster if I can ask the preliminary questions.

The Court: This is "A." The answer is yes.

The Witness: Yes.

Q. (By Mr. Brady): Did the ledger page, that is, Exhibit "A," remain in your father's books of account from the time you first saw it until the present time? A. Yes, it did.

Q. From what your father said in the conversation to which you have testified, following your mother's death, that he owed Muriel, and expected to pay her, did you consider that your father was willing to pay the debt to Muriel of \$150,000 at any time you as her guardian might request it?

Mr. Licking: I object on the ground it is leading and suggestive, argumentative, obviously calls for the conclusion and opinion of the witness.

The Court: I think so. Sustain the objection.

Mr. Brady: I would like to attempt to rephrase the question. I think I can, your Honor.

The Court: Yes.

Q. (By Mr. Brady): With reference to this \$150,000 debt from your father to Muriel, as a result of the conversation you had with him, did you

(Testimony of Lionel T. Barneson.)

form any frame of mind or have any state of mind as to his willingness to pay that debt on demand? A. Yes.

Mr. Licking: I object on the ground it is immaterial whether he had such a state of mind or not. [31]

The Court: I do not think it makes any difference what the witness thought about it. What difference would it make what his attitude toward the debt was?

Mr. Brady: Merely this, if I owe you \$100 and I meet you on the street and I tell you I intend to pay it, doesn't that make a difference? Isn't that evidence that the debtor intended to pay it?

The Court: I think we have to assume anybody who owes a debt has a legal responsibility to pay it.

Mr. Brady: This was barred by the statute of limitations, your Honor.

The Court: What of it?

Mr. Brady: If a debt is recognized by the debtor, and he says, "I intend to pay it," and he is able to pay it, you could collect on demand. That goes to the question of the value of the account receivable.

The Court: There would have to be some acknowledgment in writing under California law.

Mr. Brady: I don't mean toward collectibility on a suit; I mean a debt may have value to the creditor, even if barred from collection by suit, if the debtor is an honorable person and has the

(Testimony of Lionel T. Barneson.)

financial ability to pay, and has said, "I intend to pay it."

Mr. Licking: That is all in the record. This is all argument. Certainly what this witness believed is not important. The testimony is in the record of the conversation [32] already.

The Court: I think you have already had in the record what the man who owed the obligation said about his intention, his state of mind; the state of mind of this witness wouldn't make any difference. I don't see how that would make any difference.

Mr. Brady: Bearing in mind that this witness is the guardian of this creditor.

The Court: Yes, but he didn't become the guardian until 1936.

Mr. Brady: Yes, but this conversation took place after April 3, 1936. His mother died eleven days after.

Mr. Licking: He was appointed guardian April 3rd. The mother died April 14th, 1936.

Mr. Brady: That is right.

Q. At the time of that conversation, were you personally familiar with the financial ability of your father to pay?

Mr. Licking: Stipulate at all times he was able to pay it. That is in the stipulation of facts.

Mr. Brady: I think we are entitled to show that this man, representing the creditor, knew about the debtor's financial ability.

The Court: Of course, he did know. No use

(Testimony of Lionel T. Barneson.)

wasting time on things like that. I guess members of the family were all more or less the beneficiaries of the father's wealth. [33]

Mr. Brady: I am awfully hard of hearing, your Honor; I didn't hear you.

The Court: Why waste time going into matter of that kind? I guess members of the family were fairly well familiar with the father's affairs and ability to pay money, as do all children of affluent parents.

Mr. Brady: Of course I have only a few more questions, your Honor.

Q. Between the time of this conversation, following your mother's death, that you had with your father, and the date of his death, February 25, 1941, was there ever a single day when he couldn't have paid that debt to Muriel on demand?

A. No.

Mr. Licking: We have stipulated to that, Counsel. It is not a proper question. I move it be stricken.

The Court: All right, granted.

Q. (By Mr. Brady): Following the conversation, or at any later time, before his death, did Captain Barneson ever state he had changed his mind about paying Muriel's debt? A. No.

Mr. Licking: I object to what he didn't do. It is negative evidence and doesn't mean anything.

The Court: I don't see how a man could change his mind about his legal obligations.

(Testimony of Lionel T. Barneson.)

Mr. Brady: It was barred by the statute. [34]

Mr. Licking: I don't know whether it was barred in April of 1936 or not. I should say it was not. There were assets according to our stipulation, of the partnership paid out in 1932, later in 1932 than the date of this conversation in 1936; so that at the date of this conversation, I won't stipulate it was barred; because I doubt it. In other words, I would say that the claim was barred at this date, when there were payments in 1932. That is the stipulation.

Mr. Brady: Payments of interest in 1932.

Mr. Licking: You say interest, and I say on account of the interest in the business of the partnership; but there were payments in 1932, later than April of 1932; so that this was not barred in 1936 at the date of this conversation.

Mr. Brady: Your Honor said he couldn't resist payment. Well——

The Court: Counsel, can we assume that the fact is that the father, assuming that this was a debt, intended to pay it, or never evidenced any intention not to pay it; but he never did pay it, and he died without paying it. Those are all the uncontroverted facts, aren't they? I take it they are from what both of you have said.

Mr. Brady: Yes, but we should show your Honor——

The Court: The question is No. 1, is a debt created by this transaction; and No. 2, is it barred by

(Testimony of Lionel T. Barneson.)

the statute of limitations so as to be a worthless debt under the test of [35] the tax statute?

No matter how much you dress it up, by having testimony that the father said, "I love my daughter and I will pay it to her," but he died without paying it, and your position is that that is the year it became worthless. It seems to me it is a wholly legal question, not factual. I don't know what this witness can testify to concerning it. Obviously he had no part in the original transaction. However, you develop anything you want for the record. I am not trying to stop you.

Mr. Brady: Here is one element of proof. I think your Honor will conclude, as we have, where the debt is barred by the statute of limitations, it does not lose its value by reason of that, if the creditor will pay nevertheless; but we have to show that, even though this debt was barred by the statute of limitations on January 1st, of 1941, the first day of our taxable year, we have got to show notwithstanding it was barred by the statute before that date, it nevertheless had value. We have got to go further and show in the taxable year of 1941, it had value; and if John Barneson in 1937 had said, "I owe Muriel, I intend to pay her," when he had the financial ability to pay, and he said he would, the debt would have value, even though it was barred by the statute of limitations.

The Court: That is in the record. That is a legal question.

(Testimony of Lionel T. Barneson.)

Mr. Brady: Suppose in 1938 he had told Lionel "I am [36] going to change my mind. I will not pay."

Mr. Licking: Isn't that up to me to prove that?

The Court: You have got your prima facie showing. The rest of it becomes argument, or is up to the other side.

Q. (By Mr. Brady): Mr. Barneson, on the date the Creditors' claim was filed against your father's estate, in the court house in Redwood City, did you go down there? A. Yes.

Q. Your attorney was Martin Weil?

A. Yes.

Q. Did he go into the Judge's chambers?

A. Yes.

Q. Did you go into the chambers with him?

A. No.

Q. He came out; did he tell you that the Judge had rejected the claim? A. Yes.

Mr. Licking: That is entirely immaterial and hearsay.

The Court: Yes.

Mr. Licking: The record shows it was rejected because barred by the statute of limitations.

Q. (By Mr. Brady): Mr. Barneson, did Muriel Barneson ever keep any books of account?

A. No.

Q. Mr. Barneson, Mr. Licking and I in working out the stipulation [37] of facts, included in it a statement on page 18, lines 1 to 4, that Muriel's

(Testimony of Lionel T. Barneson.)

claim of \$150,000 against her father, "Was never listed or mentioned in any inventory filed in the court having jurisdiction over the incompetent's guardianship estate."

Mr. Licking: You say I requested it? We stipulated that that was a fact.

Mr. Brady: We stipulated it was a fact.

Q. Will you kindly explain why this was not done?

Mr. Licking: To which I object on the ground it is incompetent, irrelevant and immaterial. Why it was not done, does not matter; it was not done.

The Court: Well, the question is so broad it calls for all sorts of opinions of the witness.

Mr. Brady: I won't press it.

The Court: He can state any facts connected with the matter.

Mr. Brady: I won't press the question.

Q. Mr. Barneson, in connection with the preparation for this trial, did your counsel ask you to search the records of Muriel and Harriet, and John for their old income tax returns? A. Yes.

Q. Did your counsel ask you to see if those files contained any such copies of any United States partnership income tax returns, naming Harriet, John, and Muriel as partners? [38]

A. Yes.

Mr. Licking: Well, it is immaterial, the conversation between him and counsel.

(Testimony of Lionel T. Barneson.)

Q. (By Mr. Brady): Did you find any such returns? A. No.

Mr. Licking: I object to the question on the ground, first, the search is immaterial, and second, the colloquy, the conversation between counsel and his client is improper.

The Court: Sustained.

Mr. Licking: It has no bearing on this.

The Court: I will sustain the objection.

Mr. Brady: You may cross-examine Mr. Barneson, Mr. Licking.

Cross-Examination

By Mr. Licking:

Q. Mr. Barneson, did you have anything to do with either of these——

Mr. Brady: Mr. Licking, I wonder if I could ask the courtesy of your moving here so that I could hear you better.

Q. (By Mr. Licking): Were you yourself connected with either of the brokerage firms that have been mentioned here?

A. I was after my brother Harold lost all of his money. My father asked me to try to go in and salvage something.

Q. When was that?

A. That was around 1930, I believe.

Q. 1930. Then you were familiar with the partnership [39] affairs?

A. No, I was not particularly familiar with the

(Testimony of Lionel T. Barneson.)

partnership affairs. I went in and tried to sell the business.

Q. You went in there to try to sell the business?

A. I knew nothing about the brokerage business.

Q. In the course of selling it, did you get some idea about the assets of the partnership business?

A. I knew—what do you mean by that? Such as the financial——

Q. Did you know where the money had come from that went into the partnership?

A. Yes, I knew my father had transferred some money—I knew he had loaned my brother some money.

Q. Didn't you at that time know your father had gotten money for that purpose from Muriel and your mother?

A. No, I didn't.

Q. You didn't know that?

A. No.

Q. When did you first know that?

A. The first time it was called to my attention is when he told me he owed the money to my mother and sister.

Q. That was shortly after your mother's death?

A. Yes, it was.

Q. You were appointed guardian of your sister's estate in April, April 3rd?

A. April 3, 1936.

Q. Yes, that is right. Prior to that time, you say that [40] you considered she had been, you yourself thought she had been incompetent for some time?

A. Yes, she had.

(Testimony of Lionel T. Barneson.)

Q. Had you been managing her affairs prior to that time?

A. No, my mother had under a power of attorney.

Q. Your mother had under a power of attorney?

A. Yes.

Q. At that time did you examine her books of account?

A. No, I didn't. I had come up from Los Angeles in 1935 to take care of my mother and father.

Q. Yes.

A. And mother was still handling Muriel's affairs, and when it was decided to have me appointed guardian my brother thought I should have Mr. Blackstock of Oxnard to handle—to act as attorney. I didn't know Mr. Blackstock, but my brother told me to send him a list of Muriel's assets.

Q. To act as attorney for Muriel?

A. That is right, in the guardianship.

Q. Yes. That was in 1935?

A. That was in March of '36, I believe it was.

Q. When did you decide to have a guardianship proceeding taken with reference to your sister, or the family?

A. It was sometime probably in January of 1936.

Q. In January of 1936?

A. We first started to discuss it then. [41]

Q. You discussed it with your father and mother at that time?

A. Yes.

(Testimony of Lionel T. Barneson.)

Q. And with your other brother?

A. First, my mother and father, and later with Harold.

Q. Later with Harold. Then the decision was made among the family that you be the guardian?

A. Yes.

Q. At that time did you have any discussion as to the family financial situation?

A. No, I didn't.

Q. None at all?

A. I had a book of Muriel's investments, a small book in which the record of her investments was kept. She had always kept it in the same type of book, and I copied the figures of the securities which she held from that book, and sent the list down to Mr. Blackstock.

Q. Have you any idea where that book is now?

Mr. Brady: I have got it right here.

The Witness: Mr. Brady has it.

(Mr. Brady hands book to counsel for the Government.)

Mr. Licking: This just shows a list of securities.

A. Securities and income, I think, from those securities.

Q. Securities and income from those securities.

Mr. Brady: Don't you think we ought to identify the book, Mr. Licking, to which you are directing the witness's attention? [42]

Mr. Licking: You said it was the book.

Mr. Brady: It has got a title on the cover.

(Testimony of Lionel T. Barneson.)

Mr. Licking: I haven't intended to ask any specific questions about it. On the cover it shows "Record of Investments and Income," a printed form book for that purpose apparently.

Q. And this is the book given you by whom?

A. That is not the book that my mother kept a record of Muriel's investments in. I think I re-copied those investments into the same type book which you hold in court.

Q. Whose handwriting is this? That is what I want to get at?

A. May I see it?

(Mr. Licking hands book to witness.)

The Witness: That is my handwriting.

Q. That is your handwriting. Then this isn't the book that Muriel kept?

A. Well, I have the other book.

Q. I just asked you this one question, this is not the book Muriel kept?

A. No, not this one.

Q. Where is the other one?

The Witness: Have you got that, Mr. Brady?

Mr. Brady: I have never seen it.

The Witness: Miss Chase has it in the office. The [43] book was full, and I transferred from one book to another, the figures of the securities.

Q. This book isn't full now?

A. No, this is the last book. The other book was full. That is why I bought a new book and transferred to the new book. That is why it is in my handwriting.

(Testimony of Lionel T. Barneson.)

Q. Let me understand: You say the old book was full, and you transferred because the old book was full?

A. Yes. There was no room to make any more records?

Q. Is this supposed to be Muriel's record or yours?

A. That is—you mean the one we have here.

Q. Exactly? A. No.

Q. The one we were questioning you about?

A. That is not the record she kept herself.

Q. This is not the record she kept herself?

A. No, that is correct.

Q. Where is the record she kept herself?

A. I believe I have it in the safe in the office.

Q. Did you ever show it to Mr. Brady?

A. I am quite sure I did.

Mr. Brady: I haven't any recollection.

The Witness: I thought I showed you all of those books.

Q. (By Mr. Licking): Both of those books, what is the other book? [44]

A. Some of them my mother kept the record in the same type of book.

Q. Your mother kept a record in the same type of book that Muriel did? A. Yes.

Q. Of her investments and income?

A. Yes.

Q. Is it a record of all the income?

(Testimony of Lionel T. Barneson.)

A. Yes, I think all of the income—I couldn't say that.

Q. All the income of her securities?

A. I think it is. I don't know. I was not here——

Q. Over what period did that book extend?

Mr. Brady: Just a minute. The book is the best evidence of its contents.

Mr. Licking: I want to find out; it is not here. This is preliminary. I want to find out if the book is worth holding up the proceedings to get.

The Court: I will overrule the objection.

Q. (By Mr. Licking): What period did this book cover of Muriel's investments and income?

A. I couldn't tell you, probably from—well, I would hesitate to guess. Probably four or five years. Probably six years, before this book was used; I started the second book here, copying from another book that is also on file in the office. [45]

Q. Was copied by whom? A. What?

Q. You say the assets in the second book were copied from another book; copied by whom?

A. In the case of the book I have, they were copied either by my sister or mother. I was not here.

Q. What dates would they cover?

A. I won't try to tell you.

Q. I understand your testimony this way, this book is not complete; there is another book prior to this book?

A. No, this book contains everything that the

(Testimony of Lionel T. Barneson.)

other book contained, unless the securities were sold or something of that kind.

Q. Unless the securities were sold?

A. Yes.

Q. What is the first date in this book?

A. Well, 1936.

Q. 1936 is the first date in the book?

A. Yes.

Q. Your sister became incompetent, you say, in 1945, or was declared incompetent?

A. No, sir, she was declared incompetent.

Q. In 1936; and you say that this is a correct copy of the book she kept of her investments?

A. That is correct. [46]

Q. And is a total list of them. Well, state whether the date of the first investment in there is 1936?

A. No, the first investment is not dated 1936. The actual investment is in the year 1926. That is the year stated in which she made those investments. She might have purchased those investments some other year. I know she did purchase in 1929 and 1928——

Q. '28 and '29?

A. Yes. I happen to know the Amerada Corporation she bought that on May 1, 1928.

Mr. Licking: I wonder if that other book could be made available for my examination.

Mr. Brady: I want to know what book you are talking about.

(Testimony of Lionel T. Barneson.)

Mr. Licking: The same book we want to go on, the only book I am talking about is the book which the witness says he saw, which was a list of investments by Muriel, or Muriel's investments and income, which he got after her adjudication.

The Witness: I am not testifying it was kept by Muriel. It might have been kept by my mother. It might have been a book previously kept by Muriel.

Q. (By Mr. Licking): This book isn't the book kept by Muriel or your mother; this is a copy you made?

A. That is correct. That book was kept by me.

Q. (By Mr. Brady): Mr. Barneson, do you recall that from the question of your so-called——

The Court: Counsel, let counsel finish his cross-examination and then you can proceed to examine the witness, if there is anything he develops.

Q. (By Mr. Licking): Where is the other book from which you copied, state you copied this?

A. It is in my safe.

The Court: He has said several times it is in his safe, down in his office.

Mr. Licking: In your office here?

A. Yes.

Mr. Licking: No more questions on that line.

Q. Now, could that book be made available? Could you get that to court here?

A. Yes, sir.

Mr. Licking: I would like, your Honor, to ex-

(Testimony of Lionel T. Barneson.)

amine that particular book. It may be there isn't anything material in it. If there is, I would be quite certain Mr. Brady and I can stipulate.

The Court: You are entitled to have the book produced.

Mr. Licking: I don't like to have a trial held up. I would like to have the book produced by Mr. Barneson; if there is anything, I will make an appropriate motion to reopen and add that.

Mr. Brady: At the conclusion of the hearing today, Mr. Licking and I can go to Mr. Barneson's office and he can examine it. [48]

Mr. Licking: I don't want to go to Mr. Barneson's office.

The Court: The witness can turn over the book to you and you can, in turn, let Mr. Licking see it.

Mr. Licking: Yes.

The Court: That is fair enough.

Q. (By Mr. Licking): Do you know when you filed your inventory in the estate of the guardianship?

A. I filed my inventory before the—sent it down to Mr. Blackstock before the 3rd of April, sometime in March; and I sent it to Mr. Blackstock for filing. I didn't go down to Ventura.

Mr. Brady: That was 1936 you are talking about.

Q. (By Mr. Licking): In 1936? A. Yes.

Q. Do you know when it was filed by him?

A. What I was told, it was the day of the guardianship proceeding; but I don't know. I imagine it would be.

(Testimony of Lionel T. Barneson.)

Q. You believe it was filed the same day you qualified as guardian?

A. I don't know. I assume that would be a matter of record down in the court house at Ventura.

Q. That is a matter of record in the court house at Ventura. We can check that. You don't know when it was filed. This would also be a part of that inventory, this debt? A. No. [49]

Q. You wouldn't know about it?

A. I didn't know of the debt at that time.

Q. You filed an annual account after that every year, didn't you? A. Yes.

Q. Did you ever at any time request payment from your father of this account, before you filed the claim against his estate?

A. No, I didn't.

Mr. Licking: I think that is all.

Redirect Examination

By Mr. Brady:

Q. Mr. Barneson, this book that I show you, called a record of investments and income, does that list anything in it about securities? A. No.

Q. Does it list any income other than dividends or interest? A. No.

Q. Did you ever attempt to have it list anything but dividends or interest income?

A. I do not think there is anything but dividends or interest income that came in during the time I was handling her assets.

(Testimony of Lionel T. Barneson.)

Q. Mr. Barneson, when did you first show me this book? Is my recollection correct you told me that you have copied the material that appears in here from a similar record that had been kept by your mother and Muriel?

A. I am quite sure I told you that either my mother or Muriel [50] left off in the old book—but the old book will show my mother's handwriting.

Q. To the best of your knowledge was Muriel able to keep any record such as this during the years 1933, 1934, 1935, and 1936?

A. Not from 1931 on.

Q. So if Muriel kept a book it was prior to 1931? A. Yes.

Q. Did I ever ask you to show me that?

The Court: What difference does that make?

The Witness: I don't recollect.

Mr. Brady: That is all I have, your Honor.

Mr. Licking: No further questions. Of course, I want to see the other book.

The Court: We have covered that. Is that all, Mr. Brady.

Mr. Brady: That is all. I would like the record to show that Mr. Licking has never asked me to produce anything that I have failed to produce.

Mr. Licking: That is true.

The Court: It just developed in the cross-examination that there was this book?

Mr. Licking: I had never heard of this book before. It might have some bearing.

Mr. Brady: The respondent rests as far as any testimony concerned, and as far as any documentary proof is concerned? [51]

Mr. Licking: The Government will rest on the documentary proof already in the record, with an understanding with Counsel if there is anything material in the book, I may offer it. If there is another piece of documentary evidence that I consider material, I would like to offer it.

The Court: I suppose you gentlemen will want to file some memoranda.

Mr. Licking: Counsel filed an opening memorandum today. I do not know whether he wants to file a more elaborate memorandum or not.

The Court: I have just glanced hurriedly at it. Apparently it is the plaintiff's contention that the statute of limitations itself does not necessarily make a debt worthless for the point of view of tax law but merely fixes the period beyond which the creditor cannot sue.

Mr. Licking: That is correct.

The Court: And he has cited some cases. I suppose that the Government will want to file some replies.

Mr. Licking: Yes.

Mr. Brady: We would like to file a brief.

The Court: I haven't had a chance to read the stipulation. It is quite lengthy.

Mr. Licking: It is.

The Court: I think so. Do you wish to file any further memorandums? [52]

Mr. Brady: Yes, I do, your Honor.

The Court: Opening memorandum?

Mr. Brady: Yes; and the reply. Is that to be sent up here?

The Court: Yes.

Mr. Brady: I would like to do that.

The Court: What time would you suggest?

Mr. Brady: Ten days before we get the transcript—I haven't had any vacation.

The Court: Thirty days.

Mr. Brady: Thirty days will be ample.

The Court: To file the opening memorandum. How long will you want?

Mr. Licking: I should like 40.

The Court: Suppose we say, 30, 30, and 10.

Mr. Brady: Could it be 30, 30, and 15?

The Court: 30, 30, and 15.

Mr. Brady: That is all right.

Mr. Licking: Make my time 40 days.

The Court: I am really become quite a cynic on fixing time for briefs. No matter what time I fix both attorneys come around with the stipuations to extend.

Mr. Brady: I don't ask for extensions, your Honor.

The Court: Most attorneys do, however.

Mr. Licking: 40 days for me. [53]

The Court: 30 for Mr. Brady, 40 for you and 15 for Mr. Brady.

Mr. Brady: Yes. I will try to get mine in before the 30. Just a minute, if I may, your Honor. Mr.

Wood and I planned to ask for something further this afternoon. I would like it if Mr. Licking could oblige me by going to Mr. Barneson's office and getting out the books so that if he decides there is nothing in it he wants to bring out to the attention of the Court, we needn't worry about that in our briefs.

Mr. Licking: I would like some time to examine the book. In fact, I would like to have it examined by the accountant here.

The Court: Why don't you have the book delivered to you this afternoon by Mr. Barneson and you can turn it over to Mr. Licking, and get his receipt to you.

Mr. Brady: I am leaving for down South. I won't be able to deliver it to him.

The Court: If there is nothing he wants to do about the matter that will be the order; of course, if he wants to reopen the case, he will have to take it up with you.

Mr. Brady: One further point, your Honor. I think it is quite proper, since the Government has taken the position that Harriet, John and Muriel Barneson were partners, that they produce, if they are in existence, any partnership income tax returns of Harriet Barneson, and Muriel and John that may be [54] filed with the Bureau of Internal Revenue, and with that in mind I wrote Mr. Licking a letter on July 18th, and suggested that he get all pertinent tax returns here; and he tried, he told me to find

them—he told me he wrote a letter to the Bureau and they wrote they didn't have them; but I am now narrowing the question to the partnership income tax returns; Harriet, John and Muriel as partners. If there was any returns, we feel that it would be fair with us for the Government to produce them; and even though the records would have been sent to Washington, the Collector here would have a record of the filing of the return.

The Court: Return of information.

Mr. Brady: That is right.

The Court: Partnership return of information?

Mr. Brady: That is right. If, as the Government contends, that, legally, John and Harriet and Muriel were partners presumably they filed a partnership information return. If there is one, that is evidence. We want to see that partnership return.

Mr. Licking: That is negative evidence, and consequently a matter for argument.

The Court: It would be only self-serving.

Mr. Brady: Not at all. If they were partners, why, they are required to file a return. There is a legal presumption that every one acts legally. There is a presumption your Honor filed his Federal Income Tax return. [55]

Mr. Licking: You mean there is a law requiring separate partnership returns be filed.

Mr. Brady: There is precisely, precisely. That is why I am making my request.

The Court: I don't know whether that was the law in 1941.

Mr. Licking: In the first place I don't consider it proves anything. It proves nothing.

The Court: Well, irrespective of all that, all that I have before me now is the stipulation facts, plus the exhibits attached to the stipulation, and all of the evidence concerning the nature of the relationship in this matter between the father and daughter.

Mr. Brady: Well, the record now shows a request to produce such partnership tax returns as might have been filed.

The Court: The record now shows it, for what it is worth in the record.

Mr. Licking: Then I would make one request. I have discussed it with Counsel before. I want to bring the accounts of Muriel and Harriet with John here to date, to show what the treatment of those accounts was during the period they run. They run here merely to—both accounts shown here run merely to 1929. The ledger sheet shows entries up to 1941.

Mr. Brady: End of 1931, I think, Mr. Licking.

Mr. Licking: No, there are transactions in the accounts in 1941, and up to 1941, showing that there were [56] claims—showing that the account between Muriel Barneson and John Barneson was active and open during that period. That is something that I hadn't known until I discussed it. I can, if I may, put the agent on the stand for that one question; he has examined those records.

The Court: I don't know what you gentlemen are talking about. Have you submitted this case? Is this some other evidence, or are you arguing about something?

Mr. Licking: I asked if the counsel would have any objection to my putting in the other ledger sheets, showing the Muriel and John Barneson account was kept open up to 1941, and did not close in 1928 and 1929.

The Court: Are you referring to Exhibit A and B-1.

Mr. Brady: B and B-1 is the so-called open account.

Mr. Licking: The exhibits B and B-1 showing the accounts up to 1931. I am just informed that the account was open and active up to 1941 and I wish to put in those other sheets, by putting on the agent.

The Court: Are they available, are they available?

Mr. Licking: I am speaking of Muriel now. Yes.

Mr. Brady: Your Honor, I have been working on this stipulation ten days. I have no desire to keep out anything that should be in.

Mr. Licking: If I may, your Honor, reopen for a moment. I will put the agent on the stand and ask him just a few questions with reference to the account. [57]

Mr. Brady: That may dispose of it. That may dispose of it.

LOUIS SHEVLAN

recalled, having been previously sworn.

Direct Examination

By Mr. Licking:

Q. Mr. Shevlan, you are an agent of the Internal Revenue Department?

A. That is correct.

Q. In what capacity?

A. Well, my title is Internal Revenue Agent.

Q. I see. Did you participate in preparing the investigation for refund which is the basis of this suit?

A. I didn't participate in the refund examination. I made the original examination of the case.

Q. You made the original examination of the case; in the case of that examination, did you have occasion to see the books of account kept by John Barneson?

A. I did.

Q. Particularly with reference to the Muriel E. Barneson account?

A. That is correct.

Q. There were two accounts in the name of Muriel E. Barneson, one of which is Exhibit A now in evidence, and the other is Exhibit "B" and B-1.

A. That is correct. They are, Exhibit B and and B-1 are not complete.

Mr. Brady: Are not what?

A. Beg pardon.

Mr. Brady: I didn't hear the last.

A. I said Exhibit B and B-1 are not complete. The complete accounts of Muriel Barneson are on the books of John Barneson.

(Testimony of Louis Shevlan.)

Mr. Licking: Exhibit A is complete on that sheet? A. Yes.

Q. You say Exhibit B and B-1 are not complete, not necessarily in that one sheet?

A. They are not complete here, where they end December 31, 1931, I believe the account on the books was open up until 1941.

Q. And there were transactions reflected in that account? A. Until 1941.

Q. Until 1941, advances and——

A. Debits and credits?

Q. Debits and credits up until 1941?

A. That is right.

The Court: Did they have anything to do with this matter of the \$150,000 transaction with the father?

A. Well, sir, that question is a legal question, I believe, as to whether or not these advances and these transactions in the Muriel E. Barneson account would keep the statute open.

Mr. Licking: That was the question. [59]

The Court: Were there any entries affecting the entries included in the stipulation here, that had to do with the so-called \$150,000 transaction that is involved in this case?

A. Specifically relating to the \$150,000, no sir.

Mr. Brady: I didn't get that.

The Court: He said no sir.

Mr. Brady: No sir.

(Testimony of Louis Shevlan.)

Q. (By Mr. Licking): They were other transactions? A. Yes.

Q. Debits and credits between Muriel and John Barneson? A. That is correct.

Cross-Examination

By Mr. Brady:

Q. Could you point out to us those entries that appear in Miss Barneson's account?

A. I have a statement. There were other charges made against the open account of Muriel E. Barneson on the books of John Barneson, in the year 1941, and the years immediately preceding. What the nature of those items are, I haven't gone into; but there were debits and credits of various kinds. It is an open account.

Q. But was a separate account from the Muriel E. Barneson loan account?

A. One account is entitled "Muriel E. Barneson," and the other account is entitled "Muriel E. Barneson Loan Account." [60]

The Court: Does that cover it?

Mr. Licking: That covers what I want, your Honor.

The Court: Case may stand submitted: 30, 40, and 15.

Mr. Brady: Mr. Wood informs me Mr. Barneson left some time ago to go and get that book.

The Court: You gentlemen can arrange that between you. I am not going to hold court in session

for that. If there are any further proceedings you can reopen.

Mr. Licking: Yes, if it is necessary to reopen the case, we can make the application.

(An adjournment was taken until Wednesday, September 29, 1948, at 10:00 A.M.) [61]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying document and Exhibits, listed below, are the originals filed in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint to Recover Incomes Taxes.

Answer.

Stipulation of Facts.

Stipulation to Correct Reporter's Transcript.

Order for Judgment.

Order of Court.

Defendant's Proposed Amended Findings of Fact and Conclusions of Law.

Plaintiff's Objections to Defendant's Proposed Amended Findings of Fact and Conclusion of Law.

Letter of Joseph D. Brady.

Findings of Fact and Conclusions of Law.

Judgment.

Certificate of Probable Cause.

Notice of Entry of Judgment.

Notice of Motion for New Trial.

Affidavit of Service by Mail of Notice of Motion for New Trial.

Statement of Plaintiff's Reasons in Opposition to Defendant's Motion for New Trial and List of Authorities on Which Plaintiff Relies.

Order Denying Defendant's Motion for New Trial.

Notice of Denial of Motion for a New Trial.

Notice of Appeal.

Notice of Filing Notice of Appeal.

Order Extending Time to File Record and Docket Cause on Appeal.

Statement of Points on Which the Defendant Intends to Rely on Appeal.

Defendant's Designation of Contents of Record on Appeal.

Exhibits Accompanying Stipulation of Facts, to wit: A, B, B-1, C, D, E, F, G and H.

Reporter's Transcript for September 28, 1948.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 5th day of August, A.D. 1949.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12320, United States Court of Appeals for the Ninth Circuit. James G. Smyth, Collector of Internal Revenue, for the First District of California, Appellant, vs. Muriel E. Barneson, also known as Muriel Elfrida Barneson, an Incompetent Person, by Lionel T. Barneson, Guardian, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 5, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12320

JAMES G. SMYTH, Collector of Internal Revenue,
Appellant,

vs.

MURIEL E. BARNESON, an Incompetent Person,
by Lionel T. Barneson, Guardian,
Appellee.

APPELLANT'S STATEMENT OF THE
POINTS ON WHICH HE INTENDS TO
RELY UPON APPEAL, AND DESIGNA-
TION OF THE RECORD ON APPEAL

Comes now the appellant in the above matter and presents his statement of the points on which he intends to rely on appeal, as follows:

1. Appellant adopts as his statement of the points on which he intends to rely the "Statement of Points on Which Defendant Intends to Rely on Appeal," filed in the District Court in the above action and included in the transcript of record filed in this Court.

Appellant designates the entire transcript of record to be printed.

/s/ FRANK J. HENNESSY,

U. S. Attorney,

/s/ C. ELMER COLLETT,

Assistant U. S. Attorney,

Attorneys for Appellant.

No. 12,320

IN THE
United States Court of Appeals
For the Ninth Circuit

JAMES G. SMYTH, Collector of Internal
Revenue, for the First District of
California,

Appellant,

vs.

MURIEL E. BARNESON, also known as
Muriel Elfrida Barneson, an Incom-
petent Person, by Lionel T. Barne-
son, Guardian,

Appellee.

On Appeal from the United States District Court for the
Northern District of California.

BRIEF FOR APPELLANT.

THERON LAMAR CAUDLE,
Assistant Attorney General,

ELLIS N. SLACK,

FRANCIS W. SAMS,

Special Assistants to the Attorney General,

FRANK J. HENNESSY,

United States Attorney,

C. ELMER COLLETT,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California,

Attorneys for Appellant.

FILED

NOV 2 1949

PAUL P. O'BRIEN,
CLERK

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No. 12,320

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JAMES G. SMYTH, Collector of Internal
Revenue, for the First District of
California,

Appellant,

VS.

MURIEL E. BARNESON, also known as
Muriel Elfrida Barneson, an Incom-
petent Person, by Lionel T. Barne-
son, Guardian,

Appellee.

On Appeal from the United States District Court for the
Northern District of California.

BRIEF FOR APPELLANT.

OPINION BELOW.

The District Court entered no opinion below. The findings of fact and conclusions of law of the District Court (R. 74-78) are not officially reported.

JURISDICTION.

This appeal involves federal income taxes and interest in the amount of \$84,242.49 for the calendar year 1941. (R. 49.) These taxes and interest were paid June 28, 1945, and October 18, 1945. (R. 48, 75-76.) Within the time and in the manner provided by law a claim for refund was filed. (R. 48-49, 76.) More than six months after the filing of the claim and within the time provided by Section 3772 of the Internal Revenue Code or on February 25, 1948, the taxpayer brought an action in the District Court for recovery of the taxes paid. (R. 22.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. The judgment was entered on March 25, 1949. (R. 79-80.) Within sixty days and on May 19, 1949, a notice of appeal was filed (R. 88-89), pursuant to the provisions of 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether the District Court correctly allowed taxpayer a deduction in the calendar year 1941 for a worthless debt under the provisions of Section 23 (k)(1) of the Internal Revenue Code.

STATUTE INVOLVED.

Internal Revenue Code:

SEC. 23 [as amended by Sec. 113, Revenue Act of 1943, c. 63, 58 Stat. 21]. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(k) *Bad Debts*.—

(1) *General Rule*.—Debts which become worthless within the taxable year; or (in the discretion of the Commissioner) a reasonable addition to a reserve for bad debts; and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction. This paragraph shall not apply in the case of a taxpayer, other than a bank, as defined in section 104, with respect to a debt evidenced by a security as defined in paragraph (3) of this subsection.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

STATEMENT.

The facts material to the issue presented here as taken from the stipulation of the parties (R. 26-50) adopted by the Court below (R. 74), the findings of fact of the Court below (R. 74-77) and the exhibits attached to the stipulation of the parties (R. 50)¹ are as follows:

Taxpayer is the daughter of John Barneson, who died February 25, 1941. John Barneson had three

¹Although the exhibits accompanying the stipulation of the parties were designated as part of the record on appeal (R. 154, 156), they have not been printed as part of the record. Therefore, no record reference can be made when referring to exhibits; rather reference to the exhibit itself will be made. It is assumed the exhibits will be physically before this Court on argument.

other children, J. Leslie Barneson and Lionel T. Barneson, who are still living and Harold J. Barneson, who died February 7, 1945. (R. 26.) Taxpayer was legally adjudged incompetent on April 3, 1936 (R. 74), and her brother, Lionel T. Barneson, has at all times since that date been the guardian of her person and estate. (R. 26, 74.)

Between July 1, 1927, and February 20, 1932, Harold J. Barneson engaged in the stock and bond brokerage business as a partner in various stock and bond brokerage partnerships. (R. 27-28.) From time to time in the conduct of his stock brokerage business Harold J. Barneson needed additional working capital and after exhausting his personal credit, he turned to his father, John Barneson, for aid. This aid John supplied by investing in the particular stock and bond brokerage business of which Harold was, at the time of his investments, a partner. In this manner John advanced Harold \$300,000 in 1928 and \$125,000 in 1929. Of this total sum of \$425,000 John received \$150,000 from taxpayer and \$150,000 from his wife, Harriet. The remaining \$125,000 he supplied himself. (R. 28-30.)

Taxpayer transferred this \$150,000 to John by check. On April 3, 1928, she wrote her check No. 443 to the order of John Barneson in the amount of \$25,000. (R. 31-32.) This check stub bore the notation "Special partnership". (Ex. C.) On May 8, 1928, taxpayer wrote her check No. 444 to the order of John Barneson for \$105,000. (R. 32.) This check stub bore the notation "Special partnership—\$75,-

000.00 Loan—\$30,000.00” and the further notation “Returned Loan May 23rd”. (Ex. D.) On May 14, 1929, taxpayer wrote her check No. 378 in the amount of \$50,000 to the order of John Barneson. Written in light pencil in the handwriting of the taxpayer on the stub of this check (which bears No. 337) are the words “I think HJB Partnership”. (R. 33.)

John Barneson kept double entry books of account in which he kept two accounts with taxpayer, one entitled “Muriel E. Barneson a/c” and another and different account entitled “Muriel E. Barneson”. The “Muriel E. Barneson Loan a/c” had only two entries, both credits, namely, May 8, 1928, a journal entry in the amount of \$100,000; and May 15, 1929, cash in the amount of \$50,000. The “Muriel E. Barneson” account contains numerous debits and credits. (R. 31.) The alleged debt from John Barneson to taxpayer was never evidenced by a promissory note, nor was it ever acknowledged in writing by John Barneson except by his books of account. (R. 43.)

At various times from 1928 to 1932, John received returns or income from the moneys he had invested in the partnerships of which Harold Barneson was a partner. (R. 34, 35, 38, 41.) In 1928, John received a return of \$33,295.06 of which he paid taxpayer \$11,-098.35. (R. 34.) Taxpayer reported this in her 1928 income tax return as “4. Income from Partnerships” and gave as the source of the income “H. J. Barneson & Co., San Francisco”. (R. 34-35.) In 1929, John Barneson received a return of \$44,162.88 of which he transferred to taxpayer \$14,720.96. Taxpayer reported

this income in her 1929 income tax return as "5. Income from Partnerships" and gave as the source "H. J. Barneson & Co., San Francisco". (R. 35.) Taxpayer was never named as a partner, general or limited, in any of the stock brokerage partnerships of which her brother Harold, was a partner. (R. 35.) However, John Barneson was named as a limited partner in two of the partnerships. (R. 36.)

John Barneson received no return or income from the moneys he had invested in the stock and bond brokerage partnership of which Harold J. Barneson was a partner during 1930, and he made no payments to taxpayer during that year. (R. 36.) However, in 1931, John received a net return of \$12,000 of which he paid taxpayer \$4,363.80. In her income tax return for 1931 taxpayer reported this income as "1 Salaries, Wages, Commissions, etc." and gave as the source "Walsh, O'Connor & Barneson". Taxpayer was never an employee of Walsh, O'Connor & Barneson, however. (R. 38-40.) In 1932, John Barneson received a return of \$1,100 of which he transferred to taxpayer \$400. Taxpayer reported this income as "Interest on Bank Deposits, Notes, Corporation Bonds, etc." (R. 41.) No payments of interest or other payments were ever made to taxpayer by John Barneson except from the returns he received on the moneys invested with Harold J. Barneson. (R. 43.)

In 1932, Walsh, O'Connor & Barneson, Harold J. Barneson's last stock and bond brokerage venture, failed financially, and in his 1932 income tax return, filed jointly with his wife, Harriet, John Barneson

claimed as a loss the \$425,000 invested in this partnership in his name. In addition this tax return showed other losses of \$374,669.41. John's tax liability for the calendar year 1932 was zero. (R. 41-42.) However, taxpayer claimed no income tax deduction in her return for 1943 with respect to the \$150,000 she had transferred to John in 1928 and 1929, although she had a tax liability for that year of \$11,340.38. No part of the \$150,000 has ever been allowed taxpayer as a deduction by the Commissioner in any taxable year. (R. 42-43.)

Lionel T. Barneson, the guardian of taxpayer's person and estate since April 3, 1936, has never listed in any inventory of the assets of taxpayer's guardianship estate any obligation or debt owed taxpayer by John Barneson. (R. 45.)

John Barneson died February 25, 1941, and Lionel T. Barneson was named executor of his will. As guardian of taxpayer's person and estate, Lionel T. Barneson filed a "Creditor's Claim" for \$150,000 against the estate of John Barneson, covering the items included in the "Muriel E. Barneson Loan a/c". This claim was disallowed on the ground that the statute of limitations had run. Taxpayer never brought suit on this claim at any time subsequent to its disallowance. (R. 44-45.)

John Barneson at all times possessed the requisite financial ability to have paid \$150,000 to taxpayer on demand. (R. 45.)

In her 1941 federal income tax return taxpayer listed the \$150,000 "Creditor's Claim" as a bad debt

deduction. (R. 45-46.) This deduction was disallowed by the Commissioner and a deficiency of \$70,369.97 was assessed against taxpayer. (R. 47.) Taxpayer paid this deficiency together with interest thereon in the amount of \$13,872.52. (R. 48.)

The District Court further made the following findings of fact (R. 74-77) which the Government contends are erroneous:

On January 1, 1941, John Barneson was indebted in the amount of \$150,000 to taxpayer for cash loans in the aggregate sum of \$150,000 made by taxpayer to John Barneson in 1928 and 1929, no part of which has ever been repaid. (R. 75.)

This debt became worthless within the taxable year 1941. (R. 77.)

STATEMENT OF POINTS TO BE URGED.

The Government relies upon two points in this appeal. It is our contention that no debt in fact ever existed for which taxpayer may claim a deduction and further, that if a debt did in fact exist, taxpayer is nevertheless not entitled to a worthless debt deduction because of her failure to prove that she made reasonable efforts to collect the debt.

SUMMARY OF ARGUMENT.

1. The finding of the District Court that John Barneson was indebted to taxpayer in the amount of

\$150,000 is clearly erroneous. Before a taxpayer may take a deduction from gross income for a bad debt, the debt must be proved to have an existence in fact. It is the intention of the parties at the time of the transaction alleged to create the debt and not subsequent events which is controlling. In determining whether there was in fact, a loan, family transactions must be subjected to close scrutiny.

The facts in the present case indicate the transaction here under consideration to be an investment rather than a loan. Taxpayer's notations on the stubs of the checks by which she transferred the funds here sought to be deducted indicate that she did not intend the transfers to constitute loans. The nature and the character of the income derived by taxpayer from the transactions here in controversy are inconsistent with any view that the transfers were loans but rather partake of a return on an investment. Taxpayer has never received any note or other evidence of an obligation to repay from her father, John Barneson, for the funds transferred. The manner in which taxpayer reported the income derived from the funds transferred in her income tax returns is indicative of an investment and not a loan. Finally, although taxpayer's guardian stated he knew John Barneson to be indebted to taxpayer in the amount of \$150,000, he never reported this obligation as an asset of taxpayer's guardianship estate.

2. Throughout the entire period of 12 years that the indebtedness of John Barneson to taxpayer was in existence before John Barneson's death, taxpayer

took absolutely no steps to obtain payment, never requested of John Barneson that he fulfill his obligation, nor ever sought to secure a note or other evidence of the debt. Because of her failure to take reasonable steps to collect the debt, taxpayer is not entitled to a deduction for a worthless debt.

ARGUMENT.

I.

NO DEBT IN FACT EXISTED BUT RATHER TAXPAYER'S ADVANCES WERE IN THE NATURE OF INVESTMENTS.

Admittedly the question presented here is essentially one of fact in which this Court is bound by the findings of the Court below unless they are shown to be clearly erroneous. The Supreme Court has said in *United States v. Gypsum Co.*, 333 U. S. 364, 395:

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

It is our contention that a review of the entire evidence cannot help but leave one with a definite and firm conviction that a mistake has been made.²

²It should be noted in reviewing the evidence that this is not a case wherein the opportunity of the court below to observe the demeanor and conduct of witnesses on the stand and draw conclusions as to the credibility of their testimony is of great importance, for although taxpayer did produce one witness, Lionel T. Barneson, his testimony (R. 111-143) is of little significance. Rather the case was submitted on the stipulation of the parties (R. 26-50) and documentary evidence (see fn. 1, *supra*).

It is well settled that before a taxpayer may take a deduction from gross income for a bad debt, the debt **must** have had an existence in fact, and the taxpayer must carry the burden of proving the debt. *Allen-Bradley Co. v. Commissioner*, 112 F. (2d) 333, 335 (C. A. 7th). It is the intention or agreement of the parties at the time of the transaction alleged to create the debt and not subsequent acts or declarations which is controlling. *Grossman v. Commissioner*, 9 B.T.A. 643, 645; *Davidson v. Commissioner*, 26 B.T.A. 754, 755. As was said in the *Grossman* case, *supra* (p. 645):

To establish the debt petitioner must show affirmatively that there was an agreement or intention of the parties, at the time of the transaction, that the money transferred was loaned. Proof of such intention or agreement must consist of acts or declarations substantially contemporaneous with the event. Subsequent acts or declarations can not change the nature of the transaction. * * *

Furthermore, transactions between family members are to be subjected to close scrutiny in determining whether or not there was in fact a loan. *Redfield v. Eaton*, 53 F. (2d) 693, 695 (Conn.); Cf. *Montgomery v. United States*, 23 F. Supp. 130 (C. Cls.), certiorari denied, 307 U. S. 632; *Hoyt v. Commissioner*, decided April 26, 1944 (1944 P-H T.C. Memorandum Decisions, par. 44,133).

The record is replete with facts clearly indicating that the transaction here entered into between taxpayer and her father, John Barneson, was not a loan.

Of singular importance are the notations made by taxpayer on her check stubs. These notations are indicative of taxpayer's understanding and intentions in the transactions here in question. Certainly they are the only concrete evidence contemporaneous with the transactions which indicate the intentions of the taxpayer herself.

The transactions here in question involve transfers from taxpayer to her father in the amount of \$180,000. This amount was transferred by three checks in the amounts of \$25,000, \$105,000 and \$50,000. The corresponding check stubs are respectively numbered 443, 444, and 337. Check stub No. 443 bears the notation "Special partnership" (Ex. C), and on check stub No. 337 in light pencil in the handwriting of taxpayer appear the words "I think HJB Partnership". (R. 33.) The notations on these check stubs are of minor significance until considered in the light of stub No. 444. On this stub the amount of the check, \$105,000, was broken down and noted "Special partnership—\$75,000.00" and "Loan—\$30,000.00". (Ex. D.)³ The only conceivable reason for taxpayer making this distinction on her check stub was that she did not consider or intend the \$75,000 noted "Special partnership" to be a loan as she clearly did the \$30,000. This view is strengthened when one considers that the

³The facts relative to the notations appearing on the check stubs here are to be compared with *Domestic Management Bureau, Inc. v. Commissioner*, 38 B.T.A. 640, wherein items of \$5,000 and \$2,000 shown as book entries under the headings of legal fees and miscellaneous expense, respectively, were disallowed, the Board observing that none of the entries indicated that there was anything receivable from the advances in question.

\$30,000 was subsequently repaid by John Barneson, taxpayer's father. Furthermore, since taxpayer noted the other payments of \$25,000 and \$50,000 substantially the same as the \$75,000, they must be deemed to have been treated by her as the same, i.e., not as loans. Rather it would seem that these payments were investments which taxpayer desired invested in the name of her father for reasons that we can only conjecture, but perhaps because she looked to him for the guidance and protection which every child seeks from a parent.

That the transactions here in question were in fact investments and not loans is borne out by other facts appearing in the record. A basic difference between a loan and a speculative investment is that the income derived from a loan, if indeed any is derived at all, is usually of a fixed and definite amount, while a speculative investment yields a variable return or income, depending upon the success or failure of the business invested in. Taxpayer's returns or income on the funds transferred to her father, John Barneson, partake more of the nature of a speculative investment. Admittedly John Barneson used the funds derived from taxpayer to invest in various stock brokerage ventures engaged in by his son, H. J. Barneson. John Barneson received a return on his investment which varied with the relative success or failure of his son's stock brokerage ventures. Taxpayer always shared in the returns on investment received by her father in proportion to the ratio her \$150,000 bore to the entire amount her father had invested in his name. In the years in

which taxpayer's father's investment yielded no income, as in 1930, taxpayer received no payments from her father, and subsequent to the complete failure and liquidation of Walsh, O'Connor & Barneson, the last of John Barneson's stock brokerage ventures, and up to the date of John Barneson's death, taxpayer received no income from her \$150,000. If it be contended that the payments made taxpayer by John Barneson in 1928, 1929, 1931 and 1932 were in the nature of interest payments and not returns on investment, then why did not John Barneson continue these payments subsequent to the failure of Walsh, O'Connor & Barneson? Admittedly John Barneson continued to receive income from the \$150,000, for Lionel T. Barneson assigns this as his reason for wishing to defer the repayment of the sum to taxpayer. (R. 120.) Clearly then, if the nature and character of income have any bearing whatsoever on a determination of whether a transaction be a loan or an investment, it must be concluded that the transactions here in question were investments. Cf. *Cavanaugh v. Commissioner*, 42 B.T.A. 1037, affirmed by this Court, 125 F. (2d) 366 (an advance of \$3,500 was deemed an investment because taxpayer's return on the advance was a share of profits).

Further there is lacking in the transactions between taxpayer and her father any note or other evidence indicating an obligation on the part of John Barneson to repay. It is not contended that there must be some written evidence of obligation to repay in order to create a valid and binding debt which is deductible

in the year it becomes worthless under the provisions of Section 23 (k) (1) of the Internal Revenue Code, *supra*. It is contended, however, that the absence of any note or other evidence of an obligation to repay is a factor to be considered in any determination of whether or not a valid debt in fact exists. Cf. *Thom v. Burnet*, 55 F. (2d) 1039 (C.A. D.C.).

Of interest and importance to the question presented here are taxpayer's tax returns for the years 1928, 1929, 1931 and 1932, being the years in which taxpayer received some payment from her father on account of the \$150,000 transferred by taxpayer to him in 1928 and 1929. This income was reported during the years 1928, 1929, 1931 and 1932, respectively, under the headings of "Income from Partnerships", "Income from Partnerships" (R. 35), "Salaries, Wages, Commissions, etc." (R. 39) and "Interest on Bank Deposits, Notes, Corporation Bonds, etc." (R. 41.) In each instance the source of the income was given by taxpayer as the particular stock brokerage partnership in which her father at that time had invested her \$150,000. At no time did taxpayer indicate her father John Barneson as the source of this income. Clearly this is indicative of the fact that taxpayer considered the transaction in question here to be an investment, not a loan. Her father was merely a conduit through which she received the return on her investment and through which her investment was originally made, nothing more. Taxpayer undeniably indicated this to be her understanding of her father's relationship to herself with regard to the transaction here in

question, when she completely ignored him and went directly to the source of the income from her investment in reporting it in her federal income tax returns. Had taxpayer felt the transfers of money to her father in 1928 and 1929 to constitute loans and the subsequent payments received from her father to be payments in the nature of interest, she would have so indicated by writing in his name on her tax returns as the source of the income from the transactions here in question.

Finally, some consideration should be given to the inventories filed in taxpayer's guardianship estate. These inventories were filed yearly by taxpayer's guardian, Lionel T. Barneson, and were required to include a list of all of taxpayer's assets. It will be remembered that it was Lionel T. Barneson who testified (R. 119, 121) that in April of 1936 his father, John Barneson, had stated to him that he owed taxpayer \$150,000 which he intended to pay her. But at no time did Lionel T. Barneson list or mention in the inventories he filed as taxpayer's guardian any obligations of John Barneson to taxpayer. Certainly Lionel T. Barneson has taken a position in his testimony inconsistent with that taken in his inventories. The reason for these inconsistencies might be explained by considering that a tax refund of \$82,242.49 hinges upon the final outcome of the present suit. Lionel T. Barneson should be made to stand by his position taken when he had no monetary motivation, which position indicates there was no debt or obligation owed taxpayer by John Barneson.

It is apparent from a consideration of the foregoing facts that John Barneson did not in fact have any obligation to repay taxpayer the \$150,000 advanced by her in 1928 and 1929. A review of the evidence reveals the usual attributes of a loan to be lacking and many of the attributes of investments to be present. One cannot help but conclude that the decision of the District Court was clearly erroneous.

II.

TAXPAYER HAS FAILED TO SHOW ANY REASONABLE EFFORT TO COLLECT THE DEBT SUCH AS WILL ENTITLE HER TO DEDUCT IT AS WORTHLESS.

Assuming for the purposes of argument that a debt in fact arose out of the transactions here in question, taxpayer is nevertheless not entitled to a bad debt deduction under Section 23 (k) (1) of the Internal Revenue Code unless she has made a reasonable effort to collect the debt.

If in fact any debt existed, it came into being in 1928 and 1929, when taxpayer transferred the funds here sought to be deducted to her father, John Barneson. Subsequent to that time and up to the date of his death, John Barneson at all times possessed the requisite financial ability to repay the debt had taxpayer so requested. (R. 45.) But never did taxpayer or her legal representative request of John Barneson that he repay the debt, nor were any steps ever taken to protect taxpayer's interests by having John Barneson acknowledge the debt in writing or execute a note

or other evidence of obligation. In fact the only reference to the debt during the 12 years elapsing between 1929 and 1941 came from John Barneson, himself, voluntarily. According to the testimony of Lionel T. Barneson, John Barneson acknowledged shortly after Harriet Barneson's death that he owed taxpayer \$150,000 and that he fully intended to pay her. As before stated, the testimony of Lionel T. Barneson on this point must be seriously questioned.

There was then a period of 12 years during which taxpayer took absolutely no steps toward collecting a debt of \$150,000 owed her by her father, made absolutely no mention of the debt to her father at any time and did nothing to indicate that she felt a debt to be in fact in existence.

The close relationship of the parties alone is sufficient to raise the question of whether or not the debt was not in fact forgiven. *Gallagher v. Commissioner*, decided January 12, 1939 (1939 P-H B.T.A. Memorandum Decisions, par. 39,010). There can be no question but that had taxpayer chosen to ignore the family relationship, she could have collected the debt here sought to be deducted. Cf. *Gordon Corp. v. Commissioner*, 2 T.C. 571. That taxpayer may have been animated by pity, love or some kindred emotion in failing to press her father for payment of the debt is indeed commendable, but hardly entitles her to deduction of a worthless debt. *Block v. Commissioner*, decided June 7, 1943 (1943 P-H T.C. Memorandum Decisions, par. 43,267). See also *Thom v. Burnet*, 55 F.

(2d) 1039 (C.A. D.C.), wherein the Court said (p. 1040):

But where the taxpayer, because of family ties or personal relations between himself and his debtor, is not willing to enforce payment of his debt, in whole or in part, he is not thereby entitled to deduct it from his income tax as worthless.

It is evident that in order to entitle himself to a deduction of a worthless debt, a taxpayer must not only prove that a debt in fact exists, but that he has taken all reasonable steps to collect the debt and exhausted all possibility of obtaining reimbursement. *Allen-Bradley Co. v. Commissioner*, 112 F. (2d) 333, 335 (C.A. 7th). In commenting upon the failure of a taxpayer to take reasonable steps to collect a debt, the Court said in *H. D. Lee Mercantile Co. v. Commissioner*, 79 F. (2d) 391, 393 (C.A. 10th):

It is a startling proposition that a taxpayer may, for reasons of his own, decline to enforce a valid claim against a responsible concern and then assert that he has sustained a business loss which the government should share.

The case most nearly in point with the one presented here is that of *Bowser v. Commissioner*, decided July 29, 1948 (1948 P-H T.C. Memorandum Decisions, par. 48,137). In the *Bowser* case taxpayer had loaned his father \$700 on February 24, 1923, and received his father's six per cent promissory note of even date payable February 24, 1924. The father paid nothing on the note and died in 1941. Taxpayer orally requested

payment of the executor of his father's estate but was refused on the ground that the note was outlawed. Taxpayer did not press his claim further. The Tax Court denied the deduction of the note as a worthless debt, observing that a failure to enforce payment of a collectible note will not support a deduction.

If anything, the *Bowser* case is stronger than the one presented here since it was a case wherein there was a definite debt in existence as evidenced by a promissory note. The facts with regard to the steps taken toward collecting the debt do not differ materially from those presented here, however. Admittedly, in the present case, taxpayer, through her legal representative, did file a written claim against the estate of John Barneson, while in the *Bowser* case taxpayer requested payment orally only. However, when viewed in the light of surrounding circumstances, the written claim filed by taxpayer must be deemed only a formality thought necessary to qualify the debt for deduction.

It is evident from the authorities cited above that taxpayer, by failing to take any action whatsoever toward collecting the debt from her father, a person well able to meet his financial obligations, has not proved that she made any reasonable effort to collect the debt and must, therefore, be denied the deduction here sought.

CONCLUSION.

The judgment of the lower Court should be reversed.

Dated, November 2, 1949.

Respectfully submitted,

THERON LAMAR CAUDLE,

Assistant Attorney General,

ELLIS N. SLACK,

FRANCIS W. SAMS,

Special Assistants to the Attorney General,

FRANK J. HENNESSY,

United States Attorney,

C. ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Appellant.



No. 12320

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES G. SMYTH, Collector of Internal Revenue, for the
First District of California,

Appellant,

vs.

MURIEL E. BARNESON, also known as Muriel Elfrida
Barneson, an Incompetent Person, by Lionel T. Barne-
son, Guardian,

Appellee.

On Appeal From the United States District Court for the
Northern District of California.

BRIEF FOR APPELLEE.

FILED

NOV 26 1949

JOSEPH D. BRADY, **PAUL P. O'BRIEN,**
WALTER L. NOSSAMAN,
JAMES L. WOOD,

c/o Brady & Nossaman,
433 South Spring Street,
Los Angeles 13, California,

Attorneys for Appellee.

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No. 12320

IN THE

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JAMES G. SMYTH, Collector of Internal Revenue, for the
First District of California,

Appellant,

vs.

MURIEL E. BARNESON, also known as Muriel Elfrida
Barneson, an Incompetent Person, by Lionel T. Barne-
son, Guardian,

Appellee.

On Appeal From the United States District Court for the
Northern District of California.

BRIEF FOR APPELLEE.

Opinion Below.

The District Court entered no opinion below. The find-
ings of fact and conclusions of law [R. 74-78] are officially
reported in 85 Fed. Supp. 657.

Jurisdiction.

This appeal involves federal income taxes and interest
in the amount of \$84,242.49 for the calendar year 1941.
[R. 49.] These taxes and interest were paid June 28,
1945, and October 18, 1945. [R. 48, 75-76.] Within
the time and in the manner provided by law a claim for
refund was filed. [R. 48-49, 76.] More than six months
after the filing of the claim and within the time provided
by Section 3772 of the Internal Revenue Code or on

February 25, 1948, the taxpayer brought an action in the District Court for recovery of the taxes paid. [R. 22.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. The judgment was entered on March 25, 1949. [R. 79-80.] Within sixty days and on May 19, 1949, a notice of appeal was filed [R. 88-89], pursuant to the provisions of 28 U. S. C., Section 1291.

Question Presented.

Whether the District Court correctly allowed taxpayer a deduction in the calendar year 1941 for a worthless debt under the provisions of Section 23(k)(1) of the Internal Revenue Code.¹

Statute Involved.

Internal Revenue Code:

Section 23(k)(1), as amended by Section 124(a) of the Revenue Act of 1942 and by Section 113 of the Revenue Act of 1943, provides for the deduction of—

“Debts which become worthless within the taxable year; * * *.”² (26 U. S. C. 1946 Ed., Sec. 23.)

¹In the course of the opening statements [R. 104], the District Court stated “the real question” as: “Is a debt in existence in 1928-1929, becoming outlawed in 1933, the debtor dying in 1941, the claim being presented to his estate in 1941 and being disallowed, when if at all is it that the debt becomes worthless?”

²Section 124(d) of the Revenue Act of 1942, approved October 21, 1942, made the amendment contained in Section 124(a) applicable to taxable years beginning after December 31, 1938. The pertinent language of Section 23(k), *prior* to the retroactive amendment of 1942, provided for the deduction of “Debts ascertained to be worthless and charged off within the taxable * * *.” In the case at bar the result would be the same under the old language as it is under the new, as 1941 was the year in which the debt both became worthless and was ascertained to be worthless.

Statement.

Appellant's statement of the case (Br. 3-8) fails to make reference to a number of undisputed facts which are consistent only with the ultimate fact found by the District Court, namely, that John Barneson was *indebted* to appellee in the amount of \$150,000. [R. 75.]

The essential facts, showing the basis for the bad debt deduction of \$150,000 from appellee's 1941 gross income allowed by the District Court, may be stated as follows:

The taxpayer, Muriel Barneson, in 1928 and 1929, transferred cash to her father, John Barneson, in an aggregate amount of \$150,000. [R. 29.] John treated these transfers as loans; his double entry books of account contain an account payable entitled "Muriel E. Barneson Loan a/c" showing credits of \$100,000 on May 8, 1928 and \$50,000 on May 15, 1929. [R. 31; Ex. A. to Stip. of Facts.] No part of said \$150,000 was ever repaid [R. 43; also Ex. A] but John Barneson at all times possessed the requisite financial ability to have paid \$150,000 to taxpayer on demand. [R. 45.]

John Barneson died February 25, 1941, which was during the taxable year here involved, and his estate was probated in the Superior Court of the State of California in and for the County of San Mateo. On June 23, 1941, the taxpayer, acting through her guardian, filed in said court a creditor's claim for the \$150,000 which she transferred to John in 1928 and 1929 and which John's books of account showed to be owing to her. On the same date this claim was rejected by the probate court on the ground that it was barred by the statute of limitations. Taxpayer did not bring suit on said claim within three months after June 23, 1941, or at any other time (*cf.* Sec. 714, Calif. Probate Code). [R. 44-45.]

In her 1941 federal income tax return the taxpayer took a bad debt deduction with respect to said \$150,000. [R. 45-46.] This deduction was disallowed by the Commission and a deficiency of \$70,369.97 was assessed. [R. 47.] This deficiency and interest of \$13,872.52 assessed thereon were paid by taxpayer under written protest. [R. 48.]

The taxpayer duly filed a claim for refund. The Commissioner having failed to act on said claim within six months, this suit was brought. [R. 48-49.]

The case was defended in the trial court on a dual basis, in the alternative: (1) that John Barneson was never Muriel's debtor with respect to said \$150,000; (2) that if he was her debtor, the debt became barred by the "California four-year statute of limitations * * * sometime in 1933 * * *"³ and presumably became worthless in that year.

The taxpayer contended successfully that where, as here, the debtor is at all times abundantly solvent, the mere running of the statute of limitations does not render a debt worthless;⁴ that John Barneson's debt retained some value, at least, at all times up to the date of his death in 1941; and that it became utterly worthless by reason of the event of death and the resulting operation of Section 708 of the California Probate Code, requiring disallowance by the probate court.

³This quotation is from the defendant-appellant's brief in the District Court, p. 21, lines 30-31.

⁴This is a contention which the Government itself has successfully advanced in a number of cases, where the creditor sought a bad debt deduction solely because the debt became subject to the defense of the statute of limitations. See *W. C. Mitchell Co. v. Commissioner*, 27 B. T. A. 645, and cases cited therein at p. 648, particularly *Appeal of Leo Stein*, 4 B. T. A. 1016.

Summary of Argument.

I. The evidence that John Barneson was indebted to taxpayer in the amount of \$150,000 is so convincing that a “finding” that he was not indebted would have been clearly erroneous. The finding of the District Court, based upon abundant and undisputed evidence which was consistent only with a debtor-creditor relationship, was clearly right.

II. Notwithstanding John Barneson could have invoked the statute of limitations at any time after 1933, his debt did not become worthless in 1940 or any prior year. It had some value, at least, up to the instant of his death on February 25, 1941—he might have paid it on, say, February 1, 1941—and became worthless on the date of death only because a California statute required the probate judge to disallow it. California Probate Code, Section 708. Both the debtor’s death and the rejection of the creditor’s claim having occurred in 1941, the debt clearly became “worthless within the taxable year” 1941.

III. Section 23(k)(1) requires *only* that a debt “become worthless within the taxable year” in order to be deductible. Where, as here, the taxpayer proves that a debt had value at the beginning of the taxable year and that it lost its value during the taxable year, the requirements of the statute have been completely satisfied.

In arguing, in Point II (Br. 17-20), that even though a taxpayer proves that a debt became worthless within the taxable year he is not entitled to a deduction unless he

also proves that he "had made a reasonable effort to collect the debt" (throughout, presumably, the *entire* period the debt existed), appellant asks this Court to add, by judicial legislation, to the only conditions prescribed by Congress a condition which would defeat the clear legislative intent. In order to prove, for example, that a debt became worthless in 1949, the taxpayer has to show that it had some value on January 1, 1949. If it had some value on that date, then according to appellant, it will be assumed that by diligence, some or all of it could have been collected in 1948. If appellant were right, by making the proof necessary to stay in court, the taxpayer would automatically prove himself out. He hasn't even the harsh choice between two horns of a dilemma. He can't win.

It is obvious, then, that carried to a logical, and not too extreme a conclusion, appellant's position reduces itself to absurdity. It is not surprising, therefore, that despite an experience with income tax laws of over 36 years, there is not a single reported decision which supports appellant's contention. The issue in *all* of the cases which appellant cites was whether the debt was *in fact* worthless. Worthlessness obviously cannot be proved without negating the possibility that reasonable efforts to collect would be successful. The taxpayers in the cases cited by appellant lost because they failed to show that efforts to collect would be unsuccessful and hence failed to sustain their burden of proving that the debt was in fact worthless.

In the case at bar the evidence proved to the satisfaction of the trier of the fact that John Barneson's debt became worthless on February 25, 1941—"within the taxable year"—a finding which could not have been made unless the Court had been satisfied from the evidence that further collection efforts would have been futile.

Section 23(k)(1) calls only for determinations of *fact*. The facts as found show that the deduction was properly allowed.

IV. The decision of this Court in *Commissioner v. Burdette*, 69 F. 2d 410, shows that the District Court was right in giving judgment to appellee. That case supplies the answers to all of the contentions made in Point II of appellant's Argument.

ARGUMENT.

I.

The Trial Court Was Clearly Right in Finding That a Debt Existed.

The trial court, upon a lengthy, carefully prepared stipulation of facts [R. 26-50] and testimony that John Barneson had orally admitted in 1936 that he owed the taxpayer \$150,000 [R. 119], found, as facts, that on January 1, 1941, the first day of the taxable year 1941, John Barneson was indebted in the amount of \$150,000 to Muriel for cash loans made by her to him in 1928 and 1929 [R. 75]; that said debt did not become worthless at any time prior to February 25, 1941, the date of John Barneson's death [R. 76-77]; and that it became worthless within the taxable year 1941. [R. 77.]

The stipulation of facts consumes 25 pages of the printed record. [R. 26-50.] In addition, there were a number of exhibits which have not been printed. The stipulation naturally contains evidence which each side desired. All of this evidence was discussed in detail in the opening and reply briefs filed by appellee in the trial court. It would extend this brief to improper length to repeat that discussion in detail here, but it may be observed that while the record contains *no evidence whatever* which is necessarily inconsistent with the finding that John was Muriel's debtor, there is much undisputed evidence which is consistent *only* with a debtor-creditor relationship. The latter type of evidence includes the following:

1. Exhibit A to the Stipulation of Facts [R. 31], being the account payable to Muriel on John's books of account, showing a debt of \$150,000.

2. Exhibit F to the Stipulation of Facts [R. 33], being a *similar* account payable to Harriet E. Barneson on John's books of account, showing a debt of \$150,000. The Stipulation also shows that John got \$150,000 from his wife, Harriet, in 1928 and 1929, at the same time and for the same purpose as he got \$150,000 from Muriel. [R. 29.] (If John was the debtor of Harriet, presumably he was the debtor of Muriel.)

3. John turned over the \$150,000 he got from Harriet and the \$150,000 he got from Muriel, together with \$125,000 from his own funds—a total of \$425,000—to his son, Harold, for use in the stock brokerage business. [R. 28-29.] All of this \$425,000 was lost when Walsh, O'Connor & Barneson failed in 1932. [R. 41-42.] John took a deduction for this *entire* \$425,000 in his 1932 tax return even though his *other* losses were far in excess of his 1932 gross income and he would have had no tax liability even if he had claimed no part of this \$425,000 as a loss. [R. 41-42; 108.] (If John were not the debtor of Harriet and Muriel, his 1932 loss would have been only \$125,000.)

4. On the other hand, Muriel paid a 1932 income tax of \$11,340.38, when she would have had no tax liability if she was a joint venturer or partner of John Barneson (as appellant urges) with respect to the \$150,000. Muriel never claimed a deduction with respect to the \$150,000 in any year except the taxable year 1941 involved in this case. And the Commissioner has never allowed any part of said \$150,000 as a deduction in any

taxable year. [R. 42-43.] (If Muriel was a joint venturer or partner it follows that the Government is now unjustly enriched by \$11,340.38, plus interest thereon since the 1932 tax was paid 16 years ago.)

5. Muriel received \$400 from John Barneson in 1932 as compensation for the use of her \$150,000. This was correctly reported as "interest" in her 1932 income tax return.

6. Following Harriet's death in 1936, John voluntarily informed his wife's executors that he owed her \$150,000 and that he would have to pay her estate [R. 119-120], which he did in 1937 [R. 122; Ex. F.] At the same time he informed appellee's guardian that he owed her \$150,000 and that he intended to pay her. [R. 119-120.]

7. Harriet's federal estate tax was \$48,652.28 greater than it would have been had John not been Harriet's debtor with respect to the \$150,000 which she transferred to him in 1928 and 1929. [R. 44.] (If John Barneson was not the debtor of Muriel, then for similar reasons he did not owe Harriet's estate \$150,000, and the Government now stands unjustly enriched by \$48,652.28, plus interest thereon since her estate tax was paid more than 12 years ago.)

The evidence which appellant claims points to a joint venture investment and not a loan is ambiguous or equivocal. This is true as to the notations on the check stubs and the erroneous labels on the income tax returns

for 1928, 1929 and 1931; as to label used in appellee's 1932 return, see 5 above.

The fact that John, in 1928, 1929, 1931 and 1932 paid Harriet and Muriel sums equal to a portion of amounts which he received from Harold as income on the \$425,000, is entirely consistent with his being their debtor. *Astoria Marine Construction Co. v. Commissioner*, 1945 P-H T. C. Memorandum Decisions, par. 45,083; 1945 CCH T. C. Memorandum Decisions, par. 14,438 (M), in which the Tax Court *rejected* the contentions of the Commissioner. See also, 30 Am. Jur. 688.⁵

Considering all of the evidence, it is respectfully submitted that if the District Court had found that John was not indebted to Muriel, such a finding would have been clearly erroneous. *Cf.*, generally, *United States v. Lambeth*, 176 F. 2d 810 (C. A. 9th). It follows, of course, that the finding of the District Court is clearly correct.

⁵The appellant's arguments with respect to the evidence to which he refers in his Point I were successfully answered in detail on pages 2 to 22 of Appellee's Reply Brief in the District Court.

II.

The Running of the Statute of Limitations in 1933 Did Not of Itself Render the Debt to Appellee Worthless. The Debt Only Became Worthless at the Instant of John Barneson's Death in 1941.

Appellee loaned John Barneson \$100,000 in 1928 and \$50,000 in 1929. This debt became barred by the California statute of limitations in 1933. (Sec. 337, Calif. Code of Civ. Proc.)

It has been invariably held in a number of cases that the mere running of the statute of limitations "does not extinguish a debt or render it worthless, but merely provides the debtor with an affirmative defense which may be pleaded against forcible collection." *W. S. Mitchell Co. v. Commissioner*, 27 B. T. A. 645, 648, and cases cited therein. And compare the decision of this Court in *Commissioner v. Burdette*, 69 F. 2d 410, where that rule was taken as settled by the Commissioner, the taxpayer and this Court.

In view of the stipulated fact that "At all times material hereto John Barneson possessed the requisite financial ability to have paid \$150,000 to plaintiff [appellee] on demand" [R. 45], it is clear that John Barneson's debt did not "become worthless" at any time prior to the date of his death on February 25, 1941. And the District Court expressly so found. [R. 76-77, Finding X.] Since the probate court rejected appellee's creditor's claim on June 23, 1941 [R. 44-45], and suit thereon would have been futile (*cf.*, Secs. 708 and 714, California Probate Code), it is likewise clear that the debt did "become worthless within the taxable year" 1941. And the District Court expressly so found. [R. 77, Finding XI.]

III.

The District Court's Findings (1) That a Debt Existed and (2) That It Became Worthless Within the Taxable Year 1941 Meet the Only Tests of Deductibility Contained in the Applicable Statute.

Section 23(k) allows a deduction for "Debts which become worthless within the taxable year * * *."

The District Court's findings of fact [R. 75-77] bring the case squarely within the only tests of deductibility provided by the statute, which is clear and unambiguous.

Point II of appellant's argument (Br. 17-20) is, in substance and effect, a request that this Court hold, as a matter of law, that even though the evidence has proved the *existence* of a debt and that it *became worthless* within the taxable year—the only tests laid down in the statute—the creditor must *also* prove that throughout the entire existence of the debt he has made what appellant calls "a reasonable effort to collect the debt."

Appellant does not cite a single court decision which so holds. Nor can he—there is no such case. And the decision of this Court in *Commissioner v. Burdette*, 69 F. 2d 410, discussed more fully hereafter, clearly could not have gone in favor of Mrs. Burdette if that were the law, for she made no effort, "reasonable" or otherwise, to collect the debt from her abundantly solvent son.

Appellant no longer argues, as he did below, that, assuming a debt existed, it became worthless *prior* to the taxable year 1941. He seems to concede that it became worthless *within* the taxable year 1941 because John Barneson's death occurred on February 25, 1941, and

California law prevented his executor from paying it because it was barred by the statute of limitations.

Appellant suggests, however, that "The close relationship of the parties alone is sufficient to raise the question of whether or not the debt was forgiven." (Br. 18.) We have carefully examined the case which appellant cites—*Gallagher v. Commissioner*, 1939 P-H B. T. A. Memorandum Decisions, par. 39,010, 1939 CCH Board of Tax Appeals Service Decision No. 10,583-A. That case involved a loan by a father to his lawyer-son. The father lost his tax case *only because*, as the Board of Tax Appeals said, "* * * we can not find as a fact that the debt was actually worthless *at any time*. * * * it affirmatively appears that the debtor's situation was no different and no worse in the tax year than it had been for several prior years. * * *." (Italics supplied.) Contrary to the implication which appellant apparently desires this Court to draw (Br. 18), the Board, in the *Gallagher* case, made no finding of fact that the debt had been forgiven.

To be sure, one who *has been* a creditor is not entitled to a bad debt deduction if he forgave the debt *prior* to the time it might have become worthless if it had not been obliterated by forgiveness. But this is so because there is in such case *no debt* to which the statutory words "become worthless" can be applied.

But the appellee never forgave the debt of her father and the appellant did not even suggest that she did while

the case was before the trial court. The trial court's findings of fact, of course, necessarily exclude the idea that the debt was ever forgiven. [R. 74-77.] And the income tax laws do not contemplate anything like a twilight zone between a debt that has been forgiven and one that remains unforgiven.

Appellant asserts (Br. 18) that "had taxpayer chosen to ignore the family relationship, she could have collected the debt here sought to be deducted." This is a paraphrase of language which appears near the bottom of page 583 of the opinion in *Nathan H. Gordon Corp. v. Commissioner*, 2 T. C. 571, cited by appellant, relating to the *Wallenstein* loan. Deduction of *that* loan was disallowed not because of the family relationship (the debtor was married to Nathan H. Gordon's niece) but because "The petitioner was not justified in considering the debt worthless." (1st sentence of last par. on p. 583.)

But compare, on the very next page of the same opinion, the Tax Court's allowance of a deduction of the Gordon Corporation's loan to *Nick Gordon*, nephew of Nathan Gordon. The court said (p. 584 of 2 T. C.):

"We have no doubt that the record spells out the basis for the allowance of the deduction. It is possible that the petitioner was *too indulgent* to Nathan H. Gordon's nephew, but before 1936 it had no reason to doubt the collectibility of the note. It then proceeded to ascertain the true condition of the debtor's affairs and justifiably came to the conclusion that the debt was worthless." (Italics supplied.)

Perhaps the appellee may have been "too indulgent" with respect to her father's debt.⁶ But as the *Gordon Corp.* case, *supra*, shows, this is irrelevant where there is in fact a debt and it becomes worthless within the taxable year. *Block v. Commissioner* and *Thom v. Burnet*, cited by appellant (Br. 18-19), are cases where the debts involved had not in fact "become worthless"—in the taxable year for which deduction was sought *or at all*—and the deduction was disallowed for *that* reason, not because of a family relationship or "too indulgent" treatment of the debtor. Hence the *Block* and *Thom* cases are not applicable where, as here, the debt concededly became "worthless within the taxable year."

Appellant asserts (Br. 19) that "It is evident that in order to entitle himself to a deduction of a worthless debt, a taxpayer must not only prove that a debt in fact exists but that he has taken all reasonable steps to collect the debt and exhausted all possibility of obtaining reimbursement." He cites *Allen-Bradley Co. v. Commissioner*, 112 F. 2d 333, 335 (C. A. 7th), a case which was rightly decided but which examination discloses to be clearly distinguishable on the ground, among others, that the Board of Tax Appeals refused to find that the particu-

⁶While appellee was not adjudicated to be incompetent until April 3, 1936, it is not disputed that she has been unable to carry on her own personal business affairs since March, 1931. [R. 114; Defendant's Proposed Finding II, R. 55.] By the time appellee's guardian was appointed, the California statute of limitations had long since run. The guardian learned of the debt to appellee at the same time that he learned of John Barneson's similar debt to Harriet Barneson. [R. 119.] And the guardian, as executor of Harriet's will, received payment in full of John's \$150,000 debt to Harriet in 1937, four years after that debt became barred. He thus had every reason to believe that John would eventually pay his debt to appellee.

lar "debt" which the taxpayer was seeking to deduct *ever* existed.

The Memorandum Findings of Fact and Opinion in the *Allen-Bradley Co.* case are reported in the CCH Board of Tax Appeals Service as Decision 10,688-B, May 8, 1939. Allen-Bradley Co. was a Wisconsin manufacturing corporation. All of its stock was owned by Lynde and Harry Bradley, brothers, president and treasurer, respectively. Their mother, Clara L. Bradley, died February 13, 1933, leaving a net estate of over \$15,000, all of which (except for a wrist watch and \$100) went to Lynde and Harry under a will executed in 1924 and of which they were executors.

Allen-Bradley Co. took a bad debt deduction for 1934 in the amount of \$8,351.45 with respect to an account receivable opened on its books in the name of Clara Bradley in January, 1931, at the direction of her sons. Between January, 1931, and the date of Mrs. Bradley's death in February, 1933, the corporation had expended its own funds for expenses of Mrs. Bradley's medical care, charging them to this account. Before any item was paid, it was first approved by Lynde.

The Board made findings of fact that no note or other evidence of indebtedness was ever given to the corporation by Lynde or Harry for the amounts advanced *at their request* to pay the expenses of their mother. It also made the significant finding that Mrs. Bradley had no knowledge that such advances were being made by the taxpayer corporation.

Ten days after the death of his mother, Lynde, acting as an officer of the taxpayer corporation, filed a claim against Clara's estate for the full amount of \$8,351.45.

Lynde and Harry, *as executors*, paid the claim on the advice of their attorney, Leo Mann, who was also attorney for the estate.

After such payment but prior to hearing before the Milwaukee County Probate Court, Mann went over the various claims with the Public Administrator, who is an officer of the State whose duty it is to safeguard the interests of the State. That official pointed out to Mann that under Wisconsin statutes the claim could not be proved by the testimony of Lynde or Harry. At the hearing before the Probate Court no evidence was offered by the Allen-Bradley Co. to establish the validity of its claim against Clara's estate. Therefore the claim was formally disallowed by the Court on June 26, 1934, following which the taxpayer corporation repaid Clara's estate, charged the amount off as worthless and uncollectible as of December 31, 1934, and claimed a bad debt deduction in its 1934 return, which the Commissioner disallowed.

The concluding paragraph of the Board's findings of fact reads as follows:

"Lynde and Harry Bradley expected that the sums advanced by petitioner for Mrs. Bradley would be repaid either by her or from the estate. They were not, but the Bradleys were the sole beneficiaries of the estate. In 1934, Lynde and Harry Bradley were solvent. Petitioner did not exhaust all reasonable means to make collection *from Lynde and Harry Bradley*. The sums advanced by petitioner were *not* uncollectible in 1934." (Italics supplied.)

The Board expressly stated in its Opinion that it made no finding that there was a debt of Clara to the taxpayer corporation. Without such a finding there could, of course, be no finding that any debt became worthless, and that could well have been the sole basis of the Board's decision against the taxpayer corporation.

However, it is also clear that the Board considered that the evidence showed that Lynde and Harry had agreed with their corporation that its advances would be repaid either by Clara or *from* her estate, and that Clara's sons should have repaid the Allen-Bradley Co. out of their \$15,000 inheritance or otherwise. The Board in the last two paragraphs of its opinion, said:

“* * * there could be *no reason* why Lynde and Harry Bradley *could not recognize their agreement with petitioner* to reimburse it for the sums advanced out of the net estate of Mrs. Bradley, in their individual capacity as sole beneficiaries of her estate. The *sole* ground for petitioner's claim that it ascertained the account receivable to be worthless in 1934 is founded upon the disallowance of the claim by the Probate Court of Milwaukee County in the State inheritance tax proceeding. This is a technical ground and is *not sufficient in this proceeding to prove that the account receivable was not collectible either in 1934 or thereafter.* Depending upon when the estate became distributable free and clear to Lynde and Harry Bradley, petitioner could make a claim *against the Bradleys* for repayment in some manner, according to the original understanding that petitioner would be reimbursed this [*sic*] defeats petitioner's claim that it ascertained to be worthless an alleged debt in 1934.

“We make *no finding* that there was a debt of Clara L. Bradley, deceased, to the petitioner. It is another question whether the agreement between petitioner and Lynde and Harry Bradley was such as to amount to an obligation of them individually to reimburse petitioner. *We think* that there was such an obligation in Lynde and Harry Bradley, but the proceeding has not been tried upon that theory and we make no holding with respect to any possible debt from the Bradleys to the petitioner. However, upon the record, which shows that *all possibility of obtaining reimbursement had not been exhausted in the taxable year*, it is held that petitioner did not ascertain any debt to be worthless in 1934 and respondent is sustained in the disallowance of the deduction claimed.” (Italics supplied.)

For the Allen-Bradley Co. to have succeeded in reducing its 1934 income tax liability by getting the benefit of a bad debt deduction in the circumstances outlined above would have amounted to a monstrous fraud on the revenue. Clara Bradley was financially able to pay her own medical expenses. If for convenience, or for any reason, Clara's sons did not see fit to spend their mother's funds during her lifetime for her medical expenses—Lynde had her power of attorney—but chose to use other funds, that was their privilege. But it was not the business of Allen-Bradley Co., the corporation, to make a loan to Clara Bradley—the Board's findings show that she was never an employee of that corporation.

The Allen-Bradley Co. clearly could not have taken a deduction, as a business expense, of the amounts it paid out for Clara Bradley's medical expense. Neither could Clara's sons have taken a deduction if they had used

their own funds to pay their mother's medical expenses. To have permitted the corporation to obtain a bad debt deduction for the same items would have been to permit a tax benefit to be obtained *by Lynde and Harry* indirectly that could not be obtained by direct means.

Lynde and Harry "inherited" \$15,000 from their mother and this was free from income tax—Section 22(b)(3) of the Revenue Acts and I. R. C. Actually, their true inheritance was only \$7,000 (\$15,000 less the \$8,000 spent by their wholly-owned corporation). Elementary principles dictate that the corporation should not get a deduction—as a bad debt or otherwise—for the \$8,351.45 spent by it at the request of the owners of all of its stock for the benefit of their mother. Indeed, a reasonably astute revenue agent would have gone further and would have suggested to Lynde and Harry Bradley that unless they repaid the \$8,351.45 to the corporation they would individually be taxed with respect thereto as for constructive receipt of a dividend, for, in the absence of an intent to repay, that was what the disbursements of the corporation really were—dividends to Lynde and Harry.

It is submitted that a careful analysis of the *Allen-Bradley* case will show: (1) that it was correctly decided; (2) that Clara Bradley was never the debtor of that corporation (whatever her status as to her sons) and that, therefore, the *particular* "debt" for which deduction was claimed *never* existed; (3) that either (a) Lynde and Harry were indebted to the corporation, in which event there was no *worthless* debt, or (b) the disbursements were dividends *constructively* paid to Lynde and Harry and the corporation was *never* the creditor of anyone.

The opinion of the Court of Appeals in the *Allen-Bradley Co.* case goes no further than to say that if a taxpayer proves the existence of a debt owing to him, he cannot sustain his additional burden of proving that the debt has become worthless where the evidence fails affirmatively to show that reimbursement is no longer possible "*in the taxable year.*"⁷ This is good law and many decisions in bad debt cases have so held.

Where the debtor is *alive*, the creditor must necessarily prove, if he is to get a deduction, that the debtor, at the end of the taxable year in which the deduction is claimed, has no assets out of which the debt might be satisfied even in part. Otherwise, the creditor cannot possibly show that the debt has "become worthless" and cannot meet *that* statutory test. In addition, the creditor must also show that the debtor had some assets in *prior* years out of which the debt could have been satisfied, at least in part. Otherwise, the creditor cannot possibly show that the debt became worthless "*within the taxable year,*" the *other* statutory test. Evidence offered for these purposes will necessarily disclose what efforts the creditor made to collect, but it is not the making of efforts to collect that the statute requires; what is required is proof that (a) the debt *is* worthless, and (b) that it *became* "worthless within the taxable year."

In the case at bar the debtor died within the taxable year 1941. As the District Court found, the debt "did not become worthless at any time prior to February 25, 1941, the date of John Barneson's death." [R. 76-77.]

⁷The italicized words are those of the Board in the *Allen-Bradley* case; for the full context see quotation *supra*, p. 20.

It is not now disputed by the appellant that, assuming John Barneson was appellee's debtor, the debt became worthless within the taxable year 1941, as the trial court found. [R. 77.] Obviously it can not be said that reimbursement was possible *after* the instant of John's death on February 25, 1941.

There is nothing in the *Allen-Bradley Co.* case that says that where a debt exists and the evidence shows that it has "become worthless within the taxable year" the taxpayer cannot have a bad debt deduction if it appears that by the exercise of different or better judgment in the past the creditor might have collected the debt *prior* to its becoming worthless. Nor does the statute say so.

Income tax statutes have never insisted on infallibility of judgment. The very existence of the bad debt provision itself shows that. "To be sure, it may not have been a wise loan, but the law does not say nor does it contemplate that only debts wisely contracted are deductible." *Redfield v. Eaton*, 53 F. 2d 693 at 694.

Examples of poor judgment not affecting deductibility are to be found in the following cases under the bad debt section: *Nixon v. Commissioner*, 2 B. T. A. 524; *Cruger Co. v. Commissioner*, 11 B. T. A. 306; *Robert S. Dennison v. Commissioner*, 4 T. C. 806. A recent decision of the Tax Court in *Gorman Lumber Sales Co. v. Commissioner*, 12 T. C. 1184, June 30, 1949, involved the deductibility of a debt of a sole stockholder to his wholly-owned corporation. The findings of fact are such that it might well be said that the taxpayer was "too indulgent" with its stockholder in respect of the debt which he owed it. But the Tax Court nevertheless rejected the contentions of the Commissioner, found that the debt became worth-

less in 1942 and constituted an allowable deduction for that year under section 23(k).

Appellant's position amounts to saying that although the creditor's human fallibility does not prejudice him so far as the *creation* of the debt is concerned, he must from that moment on become not only infallible in *enforcing* collection, but without leniency or mercy, even against a parent. The law does not prescribe a standard of conduct so impossible or undesirable. (*Cf.*, *Sooy v. Commissioner*, 10 B. T. A. 493.) It grants that some of the mistaken judgment which induced the making of the loan may result in measures short of the extreme in its enforcement, being satisfied if the debt actually becomes worthless within the taxable year, even though a creditor possessed of greater toughness or wisdom would not have sustained the loss.

If a loan is made in 1947 to a solvent debtor, repayable on demand, and becomes worthless in September, 1949—by reason of a sudden and complete deterioration in the debtor's financial condition—deduction therefor in the taxable year 1949 is not defeated by a showing that the creditor could have collected in, say, December, 1948, if he had demanded payment *at that time*. Indeed, there is an affirmative burden on the creditor to show that he could have collected in December, 1948; otherwise the evidence will not negative the possibility that the debt became worthless *prior* to the taxable year 1949.

It is clear, then, that the appellant is inviting this Court to read into the plain language of Section 23(k)(1) something that Congress not only did not put there but which would render the deduction provision meaningless. A taxpayer cannot get a deduction in the taxable year

1949 without showing not only that the debt *is* worthless but also that it did not *become* worthless in 1948 or some prior year—in short, that the debt had some value, at least, on January 1, 1949. If the debt did have some value on January 1, 1949, that was because at least a part could have been collected on December 31, 1948, if demand had been made at that time. If failure to make a demand for payment while the debt has value is to be allowed to thwart a deduction in the taxable year in which the debt becomes worthless, in what taxable year can a taxpayer get the deduction for which Congress provided?

Let us examine the remaining cases cited in appellant's brief.

Appellant quotes (Br. 19) from *H. D. Lee Mercantile Co. v. Commissioner*, 79 F. 2d 391, 393 (C. A. 10th), and asserts that the Court was "commenting upon the failure of a taxpayer to take reasonable steps to collect a *debt*." (Italics supplied.) The appellant's use of the word "debt" (p. 19) is incorrect and very misleading—as appellee pointed out in distinguishing this case at page 23 of her reply brief in the trial court.

A reading of the entire opinion in the *Lee Mercantile Co.* case shows that it lends no support to appellant. The Lee Mercantile Co. was a *purchaser* of goods, *not* a lender of money. It kept, used, and paid for the purchased goods, notwithstanding its claim that they were not up to standard. The Court said that "an unadjudicated claim for breach of contract" cannot "be considered a debt * * *." (Citing cases.) Hence, the *bad debt* provision of the income tax statute, though invoked by the taxpayer, was not really involved, and some of the language of the Court, dealing with losses in mercantile or other *busi-*

ness transactions, *not involving loans*, must be read with realization of that fact. As the Court in the *Lee Mercantile* case said, the Supreme Court has held that the "loss" provision and the "bad debt" provision are "mutually exclusive." *Spring City Foundry Co. v. Commissioner*, 292 U. S. 182, 189.

Appellant cites and discusses (Br. 19-20) *Grover Bowser v. Commissioner*, decided July 29, 1948 (1948 P-H T. C. Memorandum Decisions, par. 48,137; 1948 CCH T. C. Memorandum Decisions, par. 16,528 (M)). Appellant's brief in the trial court (pp. 16-19) relied on the *Bowser* case, but appellee's reply brief was apparently successful in distinguishing that case to the satisfaction of the trial court.

Grover Bowser's father-debtor died in 1941. The son-creditor did not claim a bad debt deduction until 1943—*two years later* and, therefore, two years, at least, too late. The findings of fact do not show the year in which Bowser asked for payment or when the administrator orally refused payment. It is reasonable to assume, however, that Bowser made his request sometime in 1941, the year of death, or at the latest in 1942.⁸ Hence the debt became worthless *prior* to Bowser's taxable year 1943 because at *no* instant of time during that year was there any possibility that it would be paid.

⁸The Kansas Statutes require an executor or administrator, within thirty days after his qualification, to publish notice of his appointment to creditors, heirs, etc. Creditors have nine months from the date of first publication to exhibit their demands against the estate. Claims not so exhibited are forever barred unless otherwise provided in the will. *Kan. Gen. Stat. 1947 Supp.*, Secs. 59-709, 59-2239; 2 *Bartlett, Kansas Probate Law and Practice* (1939), Ch. 50, Secs. 1111-1130.

In the case at bar, however, the taxable year is 1941. John Barneson died February 25, 1941. If Muriel's guardian, on, say, January 2, 1941, had asked John to pay, there can hardly be any doubt on this record that he would have paid it immediately. Certainly it can not be assumed, in determining whether the debt had value on January 2, 1941, that John would have invoked the statute of limitations as a defense. And without such an assumption the debt was not "destitute of worth, of no value or use"⁹—at any time prior to the instant of death.

Another basis for distinguishing the *Bowser* case is that there was no showing of *fact* therein that the debtor at *all* material times had the requisite financial ability to have paid the note on demand after maturity in 1924. Thus the debt might well have "become worthless" in 1928—prior to the running of the Kansas statute of limitations in 1929—or in, say, 1932. If the proof in the *Bowser* case—which involved only \$386.66 and apparently was not too thoroughly prepared—had shown that the debtor had possessed the requisite financial ability to have paid the note *at all times* between 1924 and the date of his death in 1941, *and* if Grover Bowser had taken his deduction *in the year of death*, rather than two years later, it would seem that he would have been entitled to the deduction. Judge Johnson of the Tax Court said that Bowser "has not addressed his evidence to the establishment of *any* necessary conditions precedent for deduction of the debt due him." (Italics supplied.)

⁹This definition of "worthless"—as used in the bad debt section—is the Government's, and it was approved by Chief Justice Hughes in *Spring City Foundry Co. v. Commissioner*, 282 U. S. 182.

In the case at bar appellee *negatived* the idea that John Barneson's debt to her might have become worthless in 1940 or some prior year by seeing to it that the record showed [R. 45, Stip. par. 25] the fact that "At all times material hereto John Barneson possessed the requisite financial ability to have paid \$150,000 to plaintiff on demand."

The result in the *Bowser* case is unquestionably correct. There was a failure of essential proof that the debtor could have paid *at all times* prior to the taxable year in which the deduction was sought. But if the opinion in the *Bowser* case is to be read as indicating that Judge Johnson believed, as a matter of law, that the mere running of the statute of limitations automatically renders a debt worthless, then, with deference, we respectfully urge that he is in error both as a matter of common experience and as a matter of law.¹⁰ The true rule of law—implicit in the decision of this Court in *Commission v. Burdette*, *supra*—was aptly stated in *W. C. Mitchell Co. v. Commissioner*, 27 B. T. A. 645, 648, *supra*, p. 12. The *Mitchell Co.* case, it will be observed, was *reviewed* by the *full* Board of Tax Appeals, whereas *Bowser* is the opinion of a single judge.

¹⁰That Judge Johnson, who decided the *Bowser* case, did not intend it to be so read is indicated by his later, and recent, opinion (July 7, 1949), in *Thorman v. Commissioner*, CCH T. C. Memorandum Decision No. 17,107 (M). The loan in the *Thorman* case was made in 1929. It became barred by the applicable Texas statute of limitations in 1933; Thorman conceded this and Judge Johnson, a former Texas lawyer himself, decided the case on that hypothesis. Judge Johnson nevertheless rejected the argument of the Commissioner that "no debt existed in 1943," which was the "taxable year," and held, on the facts, that "McDermott's debt [to Thorman] did not become worthless prior to 1943" although it had become subject to the Texas statute of limitations ten years earlier.

Appellant's statement (Br. 20) that the Tax Court, in the *Bowser* case, "denied the deduction of the note as a worthless debt" is true. But the inference which appellant seeks to have this Court draw—that the Tax Court thought the note was collectible and that the deduction should be disallowed because of Bowser's "failure to enforce payment" (Br. 20)—is very misleading. There is nothing in its findings or opinion that indicates that the Court thought that the Bowser note was collectible at any time during the "taxable year" 1943; quite the contrary. A reading of the last two paragraphs of the opinion shows that the court was merely answering a contention of Grover Bowser—that if he had presented his claim to the Kansas probate court the debtor's administrator would have been required to pay—when it said, in effect, that even if this were so, "it does not advance petitioner's [Bowser's] position, for failure to enforce payment of a collectible note does not support a deduction." (Citing *Griffiths v. Commissioner*, 70 F. 2d 946 and *Thom v. Burnet*, 55 F. 2d 1039.)

The correct rule of law is that where the debtor is alive and solvent, the creditor cannot successfully claim a deduction. That was the factual situation in the *Griffiths* and *Thom* cases, *supra*. The reason is obvious: in such cases there is no proof that the debt is worthless; quite the contrary. But this is not to say that where the death of a solvent debtor occurs and state law prevents payment by the executor, the debt does not "become worthless" *in the year of death* if the creditor allowed the statute to run in a prior year. Cf. *Commissioner v. Burdette*, 69 F. 2d 410 (C. A. 9th), discussed at length under Point IV, *infra*.

IV.

The Judgment Below is Completely Supported by the Reasoning and Decision of This Court in Commissioner v. Burdette, Supra.

The decision of this Court in the *Burdette* case, *supra*, contains within it the answer to every contention which the appellant has made or can make.

Mrs. Burdette loaned her son \$27,500 in 1915, evidenced by two interest-bearing notes payable "Thirty days after demand." 400 shares of stock in the Torrance-Marshall & Co. were deposited as collateral security. In 1922, while the son and debtor was ill, he sold the collateral and requested his mother to release it, which she did, and no other security was substituted instead. *No demand for payment was made* and no part of the indebtedness was ever paid, nor did the debtor repudiate the notes, but collection by suit had become subject to the defense of the California statute of limitations *many years* before the taxable year 1924—probably in 1919.

The debtor died in 1923, leaving an estate valued in excess of \$200,000. Early in 1924, a creditor's claim was presented to the executor, and allowance and payment were refused on the ground that the debt was barred by the statute of limitations. Mrs. Burdette then, in 1924, considering the notes to be worthless, charged them off and took deduction therefor in her income tax return for the year 1924.

The Commissioner, as the opinion of this Court shows (69 F. 2d at 411, 1st col.), disallowed the deduction on the ground that since "the debt actually became worthless *upon the death* of the debtor in 1923, the respondent [Mrs. Burdette] will be *conclusively presumed* to have as-

certained that fact when it occurred, and that therefore the debt was deductible in 1923 only.” (*Italics supplied.*)

The question involved in the *Burdette* case was stated as follows (69 F. 2d at 411, 1st col.) :

“The sole question involved is whether the indebtedness represented by these notes should have been written off in 1923, the year in which the maker died, or in 1924 when claim for payment was rejected by the executor; the collection of the notes concededly being barred by the California statute of limitations.”

The Commissioner lost the *Burdette* case, but only because the “old” bad debt deduction provision (in effect in 1923 and 1924, but radically changed in 1942, retroactively as to taxable years beginning after December 31, 1938—(see footnote 2, *supra*, p. 2), permitted a deduction in the year the creditor “ascertained” it to be worthless and charged it off. Under *that statute*, as was said in *Jones v. Commissioner*, 38 F. 2d 550 at 553 (C. A. 7th) :

“* * * the real question * * * is, not when did the debt become worthless, but when did decedent ascertain it to be worthless.”

This construction was followed in the *Burdette* case. This Court held that Mrs. Burdette was entitled to take the deduction in 1924—the year following the year in which her solvent debtor died, but the year in which her creditor’s claim was rejected—because she had believed in good faith “until the payment was refused by the executor in 1924” (69 F. 2d at 411, 1st col.) that a memorandum which the debtor had given her on April 20, 1923, was “a valid and binding extension of the statute of limita-

tions.” (69 F. 2d at 411, 2d col.) As it was not until 1924 that Mrs. Burdette first learned that the memorandum was not effective, it was not until 1924 that she “ascertained” the debt to be worthless.

Under the “new” bad debt provision, which is applicable in the case at bar, the question is, however, not when did the taxpayer *ascertain* the debt to be worthless, but “when did the debt become worthless” in fact. As has been said by the Tax Court in a memorandum opinion in *Ewing Hymers v. Commissioner*, 1944 P-H T. C. Memorandum Decisions, par. 44,407, 1944 CCH T. C. Memorandum Decision 14,300 (M), allowing a deduction for a bad debt in the taxable year 1941:

“The effect of this amendment [Sec. 124(a), 1942 Act] is to allow a deduction for a debt which has become worthless in the taxable year when it actually became worthless, without reference to the year in which the charge-off was made or worthlessness ascertained.”¹¹

It is clear, we submit, that the Commissioner was right in one of the two contentions which he made in the *Burdette* case, namely, that “the debt actually became worthless *upon the death* of the debtor in 1923, * * *.” It follows that the debt of \$150,000 which John Barneson owed the appellee “actually became worthless upon the death of the debtor” on February 25, 1941, although the fact of worthlessness was not realized or “ascertained” by appellee’s guardian until the probate judge rejected

¹¹In March, 1942, when appellee’s 1941 return was filed, the “old” provision had not been superseded as to 1941; and the statutory words “charged off” account for the notation made by appellee’s guardian on the check stubs, photostats of which are parts of Exhibits C, D and E to the Stipulation of Facts, R. 31-33.

appellee's creditor's claim on June 23, 1941. The deduction was claimed in appellee's return for the taxable year in which her debtor died, and it is submitted that the facts and the law sustain the deduction as claimed.

Conclusion.

The judgment of the District Court should be affirmed.

Respectfully submitted,

JOSEPH D. BRADY,

WALTER L. NOSSAMAN,

JAMES L. WOOD,

c/o Brady & Nossaman,

433 South Spring Street,

Los Angeles 13, California,

Attorneys for Appellee.

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